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## **The Dialects and Dimensions of Sustainability**

Nancy D. Perkins<sup>\*</sup>

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Once celebrated as the international benchmark for development and government decision-making, sustainability seems to have lost some ground. It is surely sharing ground with frameworks focused on climate disruption,<sup>1</sup> resilience,<sup>2</sup> and the public trust.<sup>3</sup> Sustainability's detractors point to problems with its definition and unrealistic aims,<sup>4</sup> as well as the lack of an established governance structure for sustainability.<sup>5</sup> Despite these deficiencies, the American Bar Association (ABA) has repeatedly endorsed sustainability over the past three decades, most recently in a resolution that, among other things, encourages law schools to educate students about sustainability.<sup>6</sup> One may well question why the ABA is urging the profession and academy to expend resources on a subject that is not firmly embodied in positive law and that, in any event, may be losing its clout.

Although governance mechanisms for sustainability may be lacking, the contours of sustainability are widely accepted. At its simplest, sustainable decision-making requires a three-pronged analysis that takes into account economic, environmental, and social impacts.<sup>7</sup> An abundance of literature addresses the substance and mechanics of sustainability,<sup>8</sup> consistently emphasizing the overarching objective of promoting

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<sup>1</sup> For example, West Publishing's popular Nutshell series includes a Nutshell that combines climate change and sustainability. See JOHN R. NOLON & PATRICIA E. SALKIN, CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT LAW (West Nutshell Series 2011).

<sup>2</sup> See Melinda Harm Benson & Robin Kundis Craig, *The End of Sustainability*, Soc'y & Nat. Resources: An Intl J. 0:1-6, 2 (May 7, 2014), available at <http://dx.doi.org/10.1080/08941920.2014.901467>.

<sup>3</sup> See generally, MARY CHRISTINA WOOD, NATURE'S TRUST (2014).

<sup>4</sup> See *infra* notes 34-35, 38-39 and accompanying text.

<sup>5</sup> See *infra* note 36 and accompanying text.

<sup>6</sup> ABA Resolution 105 (Aug. 12-13, 2013)(encouraging law schools to "help promote a better understanding of the principles of sustainable development in relevant fields of law"). The report accompanying the Resolution notes that Resolution 105 was the ABA's eleventh resolution on the subject. See *id.*, Rep. at 3.

<sup>7</sup> See *infra* note 22 and accompanying text.

<sup>8</sup> See, e.g., John C. Dernbach, *Agenda for a Sustainable America* (John C. Dernbach et al. eds. 1st ed. 2009); John C. Dernbach, *Acting as if Tomorrow Matters, Accelerating the Transition to Sustainability* (2012) [hereinafter "Acting as if Tomorrow Matters"]; William R. Blackburn, *The Sustainability Handbook* (2007).

development while protecting the interests of future generations.<sup>9</sup> The ABA's support for sustainability stems from the role law plays in achieving its substantive goals, and is also more practically grounded in the business of law practice.<sup>10</sup> The ABA resolution is persuasive in terms of justifying its initiative to better incorporate sustainability into the profession and to train lawyers accordingly, but it offers little to guide lawyers who want to gain an understanding of sustainability's substance and develop the legal skills that lawyering for sustainability requires.<sup>11</sup>

This article invites readers to consider the lawyer's approach to sustainability as both a language activity and a multi-dimensional task of unique proportions. In doing so, it strives to supplement the ABA position on sustainability training by suggesting analytical tools that can facilitate learning about, and practicing, sustainability. Drawing on the work of law and language scholars, as well as scholarship that probes various legal dimensions, this article examines sustainability as a discourse comprised of various dialects and as an unusually demanding, multi-dimensional discipline. It suggests that the dialects and dimensions of sustainability can function as organizational principles that help manage the subject, and as devices which, at a more theoretical level, highlight skills that are particularly appropriate for sustainability practice.

The first proposition of this article is that understanding the substance of sustainability can be facilitated by building an awareness of the different languages of sustainability that exist, and that are continuing to evolve, in the private and public sectors. This article refers to those languages as

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<sup>9</sup> See *infra* notes 16-19 and accompanying text.

<sup>10</sup> See *ABA SEER Sustainability Framework for Law Organizations*, A.B.A. Sec. Env't, Energy & Resources (SEER) 1-3, (Dec. 2, 2010), [http://www.americanbar.org/content/dam/aba/administrative/nr/projects/model\\_law\\_policy/aba\\_model\\_law\\_policy\\_rev17.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/nr/projects/model_law_policy/aba_model_law_policy_rev17.authcheckdam.pdf).

<sup>11</sup> An ABA Task Force on Sustainable Development is, however, presently at work building an infrastructure for sustainability within the ABA and exploring issues related to sustainability in legal education. *First-Year Report of the American Bar Association Task Force on Sustainable Development* 12-13 (July 31, 2014), <http://acoel.org/file.axd?file=2014%2F9%2FABA+SD+TaskForceRpt+2014.pdf>. [hereinafter *First-Year Report*].

“dialects,”<sup>12</sup> which together form the discourse of sustainability. In doing so, it borrows a “sustainability dialects” concept that has recently appeared in corporate sustainability literature,<sup>13</sup> but takes it beyond the confines of corporate social responsibility and applies it to sustainability more generally. Sustainability further requires an understanding of many substantive dimensions, including its economic, environmental, and social dimensions, as well as its temporal, intergenerational dimensions. A framework built on the dialects and dimensions of sustainability can ease the task of building an understanding of, and managing, the substance of sustainability. In other words, to know about sustainability is to know its dialects and dimensions.

This article further proposes that a dialects and dimensions approach has a secondary benefit, in that it serves to highlight legal skills that are particularly well suited to sustainability. In making this point, it draws on law and language scholarship that emphasizes the importance of legal translation skills, which are of crucial importance when dealing with the multiple dialects of sustainability. This article also looks to scholarship that urges lawyers to elevate their practice by attending to various dimensions of law and law practice, including social justice and leadership dimensions, both of which are key to effective practice in the area of sustainability law.

Part one of this piece describes the history and meaning of sustainable development, discusses the arguments of its critics, and explains why sustainability has become a focus of the ABA. Part two presents the dialects and dimensions framework as a means of organizing the substance of sustainability. To illustrate the diversity of sustainability’s discourse, it presents examples of the sustainability dialects of four sectors: the federal

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<sup>12</sup> “Dialect,” as used in this article, refers to “the form or variety of a spoken language peculiar to a[n] organizational group....” WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 502 (2d ed. 1983).

<sup>13</sup> See Gregory Unruh, *Sustainability Dialects*, Big Idea: Sustainability (Blog) June 10, 2014 (MIT SLOAN MANAGEMENT REVIEW), available at <http://sloanreview.mit.edu/article/sustainability-dialects/>. Professor Unruh points out that “sustainability means different things to different people,” and suggests that corporate “sustainability insurgents” need to “view their organization as a *network of conversations* and strategically introduce sustainability thinking into ongoing corporate conversations.” *Id.* (emphasis in original).

government, state and local governments, business and industry, and agriculture,<sup>14</sup> and summarizes relevant dimensions in the same sectors. Part three makes the argument that thinking about sustainability in terms of its dialects and dimensions additionally highlights skills that are particularly relevant to lawyering for sustainability.

## I. SUSTAINABILITY AND THE LEGAL PROFESSION

Many of the concerns that triggered the sustainable development movement were voiced in the 1960's and 1970's by influential authors who warned of the potentially catastrophic effects of unchecked industrial and population growth.<sup>15</sup> Their work, and an increasing awareness of the harms associated with industrial development, led to the first formal definition of sustainable development: "[D]evelopment that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>16</sup> That definition, which appeared in the 1987 Brundtland Report,<sup>17</sup> is still used today.<sup>18</sup> Key to the definition is the principle of intergenerational equity, which holds that actions taken today should not impair the ability of later generations to access the resources they will need for their well-being.<sup>19</sup>

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<sup>14</sup> The ABA has included some of these sectors in a list of "bright spots" in the progress toward sustainability. *First-Year Report*, *supra* note 11, at 1.

<sup>15</sup> See Michael A. Livermore, *The Meaning of Green Growth*, 3 MICH. J. ENV'T & ADMIN. L. 33, 38-39 (2013). Livermore traces the beginning of sustainability to the "second wave of environmentalism," which arose in the aftermath of the publication of Rachel Carson's classic, *Silent Spring* (1962), Paul Ehrlich's best-selling *The Population Bomb* (1968), and the Club of Rome's *The Limits of Growth* (1972). *Id.* Present-day writers have also written eloquently, and forcefully, about degradation of the earth's natural systems. See e.g., Wood, *supra* note 3.

<sup>16</sup> World Comm'n on Env't and Dev., Rep. of the World Comm'n on Env't and Dev.: Our Common Future, P1, U.N. Doc. A/42/427 (Aug. 4, 1987).

<sup>17</sup> Livermore, *supra* note 15, at 38. The Brundtland Report was published by the World Commission on Environment and Development and established international recognition of the concept of sustainable development. The Report's form name was Our Common Future. *Id.*

<sup>18</sup> SUZANNE FARVER, MAINSTREAMING CORPORATE RESPONSIBILITY 1 (2013); see also, John C. Dernbach, *Sustainable Development and the United States*, in AGENDA FOR A SUSTAINABLE AMERICA, *supra* note 8, at 7.

<sup>19</sup> See Edith Brown Weiss, *Climate Change, Intergenerational Equity, and International Law*, 9 VT. J. ENVTL. L. 615, 616-617 (2008). Weiss defines intergenerational equity as

This understanding of sustainable development gained traction in subsequent decades, appearing as a centerpiece of the 1992 Earth Summit,<sup>20</sup> and given shape in the two major documents issued at the Summit's conclusion: the Rio Declaration, and Programme of Action: Agenda 21.<sup>21</sup> In line with the Brundtland Report's definition of sustainability, Agenda 21 promoted development that meets not only economic goals, but social and environmental goals as well, specifically those associated with poverty, conflict, indigenous cultures, women and children, and public participation.<sup>22</sup> Ten years after Rio, at the 2002 World Summit on Sustainable Development,<sup>23</sup> the commitment to sustainability was broadly renewed in the wake of multiple threats to the world's economies, the environment, and the poor.<sup>24</sup> The formal result of the World Summit – the Johannesburg Declaration on Sustainable Development – noted concerns ranging from climate change, biodiversity loss, human trafficking, discrimination, and disease.<sup>25</sup>

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having three principles: “comparable options,” meaning conserving the diversity of the natural resource base so future generations can use it to satisfy their own values; “comparable quality,” meaning ensuring the quality of the environment on balance is comparable between generations; and “comparable access,” meaning non-discriminatory access among generations to the Earth and its resources. *Id.* at 616. (Emphasis added). The principles serve to balance the needs of future generations with those needs of the present generation, “neither licensing the present generation to consume without attention to the interests of future generations or requiring it to sacrifice unreasonably to meet indeterminate future needs.” *Id.* at 617.

<sup>20</sup> “The Earth Summit” is the informal name that refers to the United Nations Conference on Environment and Development of 1992. Livermore, *supra* note 15, at 39.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (listing the various social goals enumerated in Agenda 21).

<sup>23</sup> *Id.* at 40.

<sup>24</sup> *Id.* at 40-41.

<sup>25</sup> World Summit for Sustainable Development, Aug. 26-Sept. 4, 2002. *Johannesburg Declaration on Sustainable Development*, ¶ 13, U.N. Doc. A/CONF. 199/20 (2002), available at <http://www.un-documents.net/jburgdec.htm>; A secondary outcome was a commitment to the United Nations Millennium Development Goals (MDGs), which included a strong focus on the eradication of poverty. John C. Dernbach, *Sustainable Development and the United States*, AGENDA FOR A SUSTAINABLE AM., *supra* note 8, at 8.

This international history reveals a common understanding of sustainable development that has remained constant over time. Sustainability requires economic development decisions to be made with environmental and social objectives in mind in order to protect the interests of present and future generations. Well before the Brundtland Report, the United States adopted this concept in the National Environmental Policy Act (“NEPA”). Although the statute does not refer to “sustainability” or “sustainable development,” it endorses sustainability in clear terms by proclaiming that one of the nation’s guiding environmental policies is “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”<sup>26</sup> This language includes the intergenerational focus of the Brundtland Report definition and, like Agenda 21, clarifies that decisions to develop resources must take into account impacts on society and the environment.

There is no dispute that sustainability requires a three-pronged analysis to guide development decisions in order to take into account economic, environmental, and social consequences.<sup>27</sup> Despite this seemingly simple formulation, scores of definitions of sustainable development have been published in the years following the Brundtland Report,<sup>28</sup> and numerous short-hand references to sustainability have emerged, including the “three pillars,”<sup>29</sup> the “three E’s,” the “triple bottom line,” and the three P’s (“profit, pollution, people”).<sup>30</sup> The breadth of sustainability’s reach, in terms of encompassing economic, social, and environmental considerations simultaneously, coupled with a bulging grab bag of sustainable development definitions, led one writer to describe the concept as “incredibly capacious,”<sup>31</sup>

<sup>26</sup> 42 U.S.C.A. § 4331(a) (1970).

<sup>27</sup> But see Linn Mårtens, *Culture is a Basic Pillar of Sustainable Development*, May 1, 2013, available at <http://www.norden.org/en/news-and-events/news/culture-is-a-basic-pillar-of-sustainable-development> (noting a researcher’s belief that culture comprises a fourth pillar of sustainability).

<sup>28</sup> Livermore, *supra* note 15, at 41; Dernbach, *supra* note 25, at 5 (noting the “many definitions of sustainable development”).

<sup>29</sup> See e.g., John C. Dernbach et al., *The Growing Importance of Sustainability to Lawyers and the ABA*, 44 TRENDS 1 (ABA Sec. Env’t Energy & Resources 2013).

<sup>30</sup> ABA SEER Sustainability Framework, *supra* note 10, at 3. The 3E’s refers to economy, ecology, and equity, and the 3P’s refers to people, planet, and profits. *Id.*

<sup>31</sup> Livermore, *supra* note 15, at 41.



and another to remark that, “It doesn’t take much to discover that sustainability means different things to different people.”<sup>32</sup> Scholars counter that flexibility is needed in defining sustainable development and that countries should be free to adopt definitions that reflect their individual circumstances.<sup>33</sup> Still, the inability to locate a universally approved definition of sustainable development and the variability of sustainability’s shifting and fluid contours can frustrate attorneys and business managers alike,<sup>34</sup> especially those approaching the subject for the first time. Many would likely agree with the assertion that it is impossible to adequately define sustainable development as a matter of policy.<sup>35</sup>

Also troubling is the failure of global sustainability initiatives to impose binding obligations on nations, a situation that has resulted in the deterioration of the world’s environmental health.<sup>36</sup> The ongoing decline in the earth’s ecosystems has made it more difficult to determine what, exactly, is to be sustained, deflating sustainability’s usefulness except as “an overarching principle for the broadest of global ecological ideals....”<sup>37</sup> More pessimistic commentators believe that achieving sustainability is simply impossible because it requires people to be something they are not.<sup>38</sup> They point to the considerable gap between the lofty objectives of sustainability and what humans are capable of doing, not to mention what they actually want to do.<sup>39</sup> Self-interest and greed drive a corporate decision-making model that is narrowly focused on increasing wealth and avoiding liability, an entrenched dynamic that remains intact in spite of international codes of

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<sup>32</sup> Unruh, *supra* note 13.

<sup>33</sup> John C. Dernbach, *Legal Education for Sustainability: A Report on U.S. Progress*, 5 J. OF EDUCATION FOR SUSTAINABLE DEVELOPMENT 225 (2011).

<sup>34</sup> Brian J. King, *Sustainability and the Law*, 48 IDAHO ADVOCATE 22 (Aug. 2005).

<sup>35</sup> See Benson & Craig, *supra* note 2, at 777.

<sup>36</sup> *Id.* at 777-778 (stating that the deterioration of the earth’s ecosystems is being exacerbated by climate disruption).

<sup>37</sup> *Id.* at 779.

<sup>38</sup> David Barnhizer, *Waking from Sustainability’s “Impossible Dream”: The Decision-Making Realities of Business and Government*, 18 GEO. INT’L ENVTL. L. REV. 595, 596 (2006). Professor Barnhizer continues, “It is impossible to convert humans into the wise, selfless, and nearly omniscient creatures required to build and operate a system that incorporates sustainability.” *Id.*

<sup>39</sup> *Id.*

sustainable practices and non-obligatory treaty provisions.<sup>40</sup> These writers believe that change will come only through mandatory legal obligations that are made more palatable by financial incentives, but which carry costly consequences for noncompliance.<sup>41</sup>

The argument that sustainability is unachievable because of unalterable human motivations is not alone in sounding a death knell for sustainable development. A different anti-sustainability argument, grounded in both social and ecological science, claims that the era of sustainability as a governance mechanism has ended.<sup>42</sup> Against the backdrop of ineffective international commitments to sustainable development, Melinda Harm Benson and Robin Kundis Craig paint a somber picture of the earth's social-ecological systems ("SES") in the Anthropocene.<sup>43</sup> They agree that the proliferation of declarations, agendas and other expressions of support for sustainability has failed to improve the earth's SESs. Instead, there has been widespread decline, including "unprecedented and irreversible rates of human-induced biodiversity loss, exponential increases in per-capita resource consumption, and global climate change...increasing the likelihood of rapid,

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<sup>40</sup> *Id.* at 597-98.

<sup>41</sup> *Id.* at 599. Barnhizer explains, "[L]aw does not have force unless real sanctions exist sufficient to shape behavior in the desired directions. ... Law is empty platitude unless effective, efficient and adequately financed enforcement entities are created and allowed to function relatively free of political influence." *Id.* Barnhizer also argues that the social justice piece of sustainability is "extremely difficult and often unmanageable." *Id.* at 602. He is additionally concerned about globalization and the growth of corporations that are "endowed with powers greater than those possessed by many national governments," explaining that these mega firms will be difficult to control by laws. *Id.* at 607.

<sup>42</sup> See Benson & Craig, *supra* note 2, at 1 (suggesting that it is time to "move past ... the concept of sustainability" in light of the lack of binding requirements and deterioration environmental conditions world-wide).

<sup>43</sup> "Anthropocene" refers to the epoch in the earth's history beginning with the advent of the Industrial Age in the 19<sup>th</sup> century, which has been marked by massive biodiversity loss, pollution and climate change. Joseph Stromberg, *What is the Anthropocene and Are We in It?*, SMITHSONIAN.COM, JANUARY 2013, <http://www.smithsonianmag.com/science-nature/what-is-the-anthropocene-and-are-we-in-it>. Although not yet adopted by the International Union of Geological Sciences (IUGS), which maintains that we remain in the Holocene epoch (dating to the end of the last ice age), usage of "Anthropocene" is on the rise. The IUGS plans to decide whether or not to adopt the term by 2016. *Id.*

nonlinear, social and ecological regime changes.”<sup>44</sup> Defining sustainability as a goal tied to “desirable states of being” that are capable of existing indefinitely, Benson and Craig argue that the uncertainties of climate change make setting sustainable goals impossible, casting serious doubt as to the wisdom of relying on sustainable development as an environmental governance objective.<sup>45</sup> The alternative they offer is the compatible concept of resilience, which they suggest is a more realistic and effective governance goal.<sup>46</sup> Although resilience science has existed for well over a decade,<sup>47</sup> it is still evolving in both theory and application.<sup>48</sup> Nevertheless, Benson and

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<sup>44</sup> Benson & Craig, *supra* note 2, at 777.

<sup>45</sup> *Id.* at 779.

<sup>46</sup> *Id.* A resilience framework differs significantly from sustainability because it accepts the reality of disequilibrium in natural systems instead of aspiring for fixed states of sustainability. Resilience planning establishes variable goals based on a system’s ability to continue functioning while maintaining the capacity to withstand change. *Id.* It additionally allows a more transparent analysis of trade-offs between what society values and what is needed to achieve resilience, in stark contrast with the best-of-all-worlds goal of sustainability. *Id.* (arguing that using resilience as a governance tool can better address social values as compared to sustainable development).

<sup>47</sup> See, e.g., LANCE H. GUNDERSON & C.S. HOLLING, PANARCHY (2002). A seminal work in the field, *Panarchy* analyzes various theoretical approaches to develop a theory to facilitate our understanding of complex system changes. *Id.* at 5. In discussing the relationship between resilience and sustainability, the authors explain that “the sustainability of any particular state depends on the properties of the stability domain corresponding to that state,” and that resilience can be measured by “the magnitude of disturbance that can be absorbed before a system flips from one state to another.” *Id.* at 270-271. This distinction coincides with that made by Professors Benson and Craig. However, Gunderson and Holling additionally point out that the usual way to analyze the sustainability of an ecosystem is to determine its resilience, and that measures of resilience may “offer[] a useful way to address the sustainability not just of ecological systems, but also of jointly determined ecological-economic systems ...” *Id.* at 271. In contrast to Benson and Craig, who view sustainability and resilience as two separate ways to analyze integrated systems of change, Gunderson and Holling use resilience as a measurement tool to be used in assessing a system’s sustainability.

<sup>48</sup> Benson & Craig, *supra* note 2, at 780.

Craig prefer it to sustainability, which they believe has failed as an appropriate and meaningful tool for development.<sup>49</sup>

Given the uncertainties surrounding sustainability's meaning and merit in an era of social and ecological decline, the ABA's ongoing commitment to sustainability in law practice could well be questioned. Further, its encouragement of sustainability training in law schools comes at a time when many of them face significant challenges.<sup>50</sup> Law firms are still recovering from the recession of 2008,<sup>51</sup> and many law schools are steering resources toward recruiting students from an ever-shrinking applicant pool while simultaneously cutting costs. Nevertheless, the ABA's justification is persuasive. Its recognition of the importance and value of sustainability to law practice is expressed in the background to the 2010 ABA SEER Sustainability Framework for Law Organizations.<sup>52</sup> At the core of ABA's

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<sup>49</sup> *Id.* at 781. Although resilience thinking has begun to take hold in natural resource planning, it has been criticized for being deficient in dealing with social system dynamics and in addressing accountability. *Id.* at 780. One area where the concept of resilience has gained a footing is in the area of climate change. In November, 2013, President Obama directed federal agencies to assist communities in becoming more resilient to the extreme weather associated with climate change. *See* Exec. Order No. 13653, 78 Fed. Reg. 66,819 (Nov. 1, 2013). The Order seeks to build on federal agency strategies to improve resilience, in part by promoting "adaptive learning." Agencies have responded in various ways. In June, 2014, the Department of Interior announced \$100 million in grants to fund over 50 projects to improve resiliency along the Atlantic seaboard as a defense to extreme storms. Manuel Quinones, *Interior Doles Out \$100m for Restoration, Resiliency*, ENVIRONMENT & ENERGY REPORTER (June 16, 2014), <http://www.eenews.net/greenwire/stories/1060001373>.

<sup>50</sup> *See* Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598 (2010); Ameet Sachdev, "Chicago Law: Law Schools Seeing Fewer Applicants," CHICAGO LAW (March 23, 2012). Available at [http://articles.chicagotribune.com/2012-03-23/site/ct-biz/0323-chicago-law-20120323\\_1\\_law-schools-chicago-law-david-yellen](http://articles.chicagotribune.com/2012-03-23/site/ct-biz/0323-chicago-law-20120323_1_law-schools-chicago-law-david-yellen). It is no secret that legal education is facing economic challenges due to lowered numbers of applicants. The decline is reflective of the job market for law school graduates and the increasing levels of student debt that law students have incurred since the 2008 recession. These declines have caused many schools to consider cutting class sizes or tuition, lowering entrance standards, or a combination of any of the above to combat financial losses. *Id.*

<sup>51</sup> Thies, *supra* note 50, at 599 and 603.

<sup>52</sup> ABA SEER Sustainability Framework, *supra* note 10.

commitment is the understanding that law and governance are key to sustainable development,<sup>53</sup> an organic connection that makes the relevancy of sustainability to the profession self-evident.<sup>54</sup> The Framework further explains that, beyond the three pillars, sustainability’s “cross sectional approach . . . integrates a variety of legal specialties, including environmental, labor, property, tax, corporate, finance, international trade, and practice management.”<sup>55</sup> Thus, lawyers will inevitably play a key role in developing legal tools to facilitate the application of sustainability to client issues, a role that will be both challenging and rewarding.<sup>56</sup> Lawyers will also have the opportunity to commit to sustainability within their firms, which can benefit the profession as a whole by showcasing best practices in sustainable operations.<sup>57</sup>

Sustainability’s relevance to the legal profession is therefore primarily grounded in present and future needs to develop and apply laws to further sustainability’s objectives, and in opportunities for lawyers to become innovators and leaders in the sustainability movement. During times of economic downturn, the profession’s commitment to sustainability should intensify rather than waiver. The SEER Sustainability Framework explains,

[I]n tough economic times, we have a responsibility to sustain the financial viability of our law organization while doing what we can to demonstrate social and environmental actions that help fulfill the expectations of our stakeholders – our partners, employees, clients, suppliers, communities, governments, and others. Indeed, during periods of economic stress, a number of sustainability issues become of paramount

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<sup>53</sup> *Id.* at 1.

<sup>54</sup> The Framework adopts the international definition of sustainable development, which calls for the “simultaneous achievement of environmental protection, economic development, social development, and peace, for present and future generations.” *Id.* at 3.

<sup>55</sup> *Id.* at 2 (quoting the report to 2003 ABA Sustainability Resolution).

<sup>56</sup> *Id.* at 1-2 (referring to the ABA Sustainability Resolution of 2003).

<sup>57</sup> *Id.* at 2. By adopting the SEER Sustainability Framework, firms will have opportunities to adopt policies touching on “the environment, diversity, pro-bono legal services, and professional responsibility,” and will thereby “walk the talk” of sustainability. *Id.*

importance, such as employee relations, ethical compliance, waste and cost reduction ..., assistance for the unfortunate, and the counseling of clients on all these matters.<sup>58</sup>

This language obligates law firms to think and act sustainably, especially in times of economic distress. It further reveals that the rationale for sustainability in the profession is not simply about adopting best practices and being leaders; it is additionally tied to firm legacy and longevity.<sup>59</sup> For this reason, sustainability should be subsumed into firm culture, becoming an extension of the usual duties owed to clients and other stakeholders.<sup>60</sup>

The ABA is engaged in an ever-increasing array of sustainability initiatives that are solidifying sustainability's influence on the profession. The climate change crisis led the ABA to partner with the EPA to develop the ABA-EPA Law Office Climate Challenge,<sup>61</sup> and more ABA sections have embraced sustainability initiatives than ever before.<sup>62</sup> Internal developments in the ABA, along with the increased focus on sustainability outside the profession, strongly encourage lawyers to become familiar with sustainability and learn how it relates to daily practice. Lawyers also need to recognize that an increasing number of clients are committing to sustainability in their operations and will expect their attorneys to understand and share their commitment.<sup>63</sup> Client expectations regarding sustainability will drive their selection of law firms, providing a final, market-driven rationale for practitioner commitment to sustainable development.

As convincing as the ABA's case may be, it begs the question: How can lawyers think about sustainability – a discipline of exceptional scope and conflicting demands – in ways that give them a comprehensive and workable

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<sup>58</sup> *Id.* at 1.

<sup>59</sup> See William R. Blackburn, *Sustainability: How Values-Driven Law Firms are Surviving Tough Times and Prospering Over the Long Term*, LAW PRACTICE TODAY, Sept. 2010.

<sup>60</sup> *Id.*

<sup>61</sup> Dernbach et al., *supra* note 29, at 3.

<sup>62</sup> *Id.* at 3-4 (mentioning the involvement of the ABA Section on International Law, the Law Practice Management Section, the Section of State and Local Government Law, and the Section on Real Property, Trust and Estate Law).

<sup>63</sup> *Id.* at 4.

understanding of the subject as well as an awareness of skills that will help them “lawyer for sustainability?” Working with sustainability as a language comprised of multiple dialects, and as a process that fosters the exploration of new collaborations and dimensions of lawyering, are two ways to proceed.

## II. DIALECTS AND DIMENSIONS: A MEANS OF ORGANIZATION

Sustainability presents a steep learning curve to the uninitiated. Even those who have been exposed to the topic may be surprised by its complexity when confronting particular issues. Working with sustainability is challenging because its substance is unlike that of most areas of law practice; statutes devoted to sustainability are few, and there is no uniform law of sustainability. Instead, the core principles of sustainability have been, and continue to be, incorporated into various areas of law practice, implemented in myriad ways by all levels of government and by countless businesses and other private entities. Many, if not most, of those initiatives use terms other than “sustainable” or “sustainability,” instead employing language that is unique to the entity pursuing sustainable objectives.

Recently, writers have explained that the sustainability dialect of business and industry is being constructed by sustainability “insurgents” who “translat[e] sustainability insights into a dialect that resonates with their managerial colleagues.”<sup>64</sup> These insurgents work in separate functional areas, such as human resources, operations, and marketing, to merge departmental language with sustainability’s objectives.<sup>65</sup> This view, that sustainability in business and industry is comprised of many department-specific dialects, feeds the broader idea presented here, which is that sustainability in the law is comprised of the distinct dialects of the many public and private actors with whom lawyers interact on a daily basis. These

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<sup>64</sup> Gregory Unruh, *The Sustainability Insurgency: Missives from the Front Lines, Part 2*, MIT SLOAN MANAGEMENT REVIEW BIG IDEA: SUSTAINABILITY BLOG (Nov. 12, 2014), <http://sloanreview.mit.edu/article/the-sustainability-insurgency-missives-from-the-front-lines-part-2/>.

<sup>65</sup> Unruh, *supra* note 13.

dialects serve as a means of organizing sustainability's substance because they lead directly to the content of sustainability programs across the country.

As instructive as sustainability dialects can be, they alone do not fully capture the full scope of sustainability. To accomplish that objective, the dialects must be considered in conjunction with the dimensions that form the core of the discipline. Whether understood as a process or goal, sustainability is built on the dimensions embodied in the three pillars – economy, environment, and social equity – and intergenerational equity. Those foundational dimensions are in turn reflected in the more particularized dimensions of the sustainability programs of government and private enterprise. This complex mix of dimensional attributes is also part of sustainability's substance, and cannot be overlooked.

The sections below reveal the diversity of the nation's sustainability dialects and dimensions. The aim is not to fully explore the sustainability initiatives of the selected sectors, but rather to provide a sense of how each sector's dialect and dimensions reflect the substance of sustainability. Together, the samples also illustrate how a dialects and dimensions approach pulls seemingly unrelated concepts under the tent of sustainability in ways that can make the subject more manageable.

There is, admittedly, a mutually reinforcing relationship between some of the dialects and dimensions that are discussed here. Although that relationship may, at times, blur the distinction between dialects and dimensions, it should be appreciated as evidence of the highly integrative nature of sustainability analysis.

#### *A. Federal Government*

The federal government's sustainability dialect is primarily focused on internal government operations, where terminology related to sustainability planning and management – generally referred to as “green government”<sup>66</sup> – is rapidly developing, as is language related to metrics and analytics.<sup>67</sup>

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<sup>66</sup> See e.g., Sean Reilly, *DOT Adopts Unified Strategy for Meeting Green Government*



Executive Order 13514, signed by President Obama in 2009,<sup>68</sup> shapes the government's sustainability dialect by requiring federal facilities to establish reduction targets for greenhouse gasses ("GHG")<sup>69</sup> and to set goals to improve water use efficiency; eliminate waste; enhance integrated planning at the regional and local levels; improve practices related to "building design, construction operation and management, maintenance, and deconstruction"; engage in sustainable acquisition of products and services; and sustain environmental management systems for agency operations.<sup>70</sup>

As agencies work to comply with the Executive Order and begin to integrate sustainability into their operations, they are developing distinct sustainability dialects. For example, a National Research Council ("NRC") report,<sup>71</sup> known as the "Green Book,"<sup>72</sup> makes several recommendations to the Environmental Protection Agency (EPA) to assist it in developing its sustainability programs. It suggests that the agency change its language from one that speaks of ensuring "society is 'doing less bad'" to one that ensures "society is 'doing more good,'"<sup>73</sup> and urges the EPA to include the word "health" in its definition of the social pillar of sustainability in order to give due consideration to the role public health plays in social equity.<sup>74</sup> The report

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*Requirements*, E&E Daily (June 20, 2014). The White House webpage is also informative on this topic. See <http://www.whitehouse.gov/>.

<sup>67</sup> Sustainability metrics refer to the indicators that an entity measures to assess its performance in reaching sustainability goals. See generally, FARVER, *supra* note 18, at 171-79. Sustainability analytics are the tools the entity uses to conduct those measurements. See generally, *Sustainability Analytics: Assessment Tools and Approaches*, US EPA (March 7, 2013) [hereinafter *Sustainability Analytics*].

<sup>68</sup> Exec. Order No. 13514, 3 C.F.R. 13514 (October 5, 2009). Exec. Order No. 13514 is commonly titled *Federal Leadership in Environmental, Energy, and Economic Performance*.

<sup>69</sup> *Id.* at §2 (a).

<sup>70</sup> Exec. Order No. 13514, *supra* note 68, at §2 (d)-(j).

<sup>71</sup> See generally National Research Council (NRC), *SUSTAINABILITY AND THE U.S. EPA* (2011) [hereinafter *GREEN BOOK*]. The NRC is an arm of the National Academies. See [www.national-academies.org](http://www.national-academies.org).

<sup>72</sup> See, e.g., Office of Research and Dev., Nat'l Risk Mgmt. Research Lab., Sustainable Tech. Div., EOPA/600/R/12/687, *A Framework for Sustainability Indicators 2* (October 2012) [hereinafter *A Framework for Sustainability Indicators*].

<sup>73</sup> *GREEN BOOK*, *supra* note 71, at 111.

<sup>74</sup> *GREEN BOOK*, *supra* note 71, at 50. This point was important enough to the NRC to

also suggests a bi-level Sustainability Framework for the agency that emphasizes systems-wide thinking,<sup>75</sup> as well as the development of enhanced indicators and metrics to justify management decisions and measure performance.<sup>76</sup> The development of indicators should be guided by the concept of “materiality,” which requires indicators to be tailored to the issue being analyzed.<sup>77</sup>

The Sustainability Framework proposed by the NRC includes a Sustainability Assessment and Management (“SAM”) approach for major EPA decisions that employs language that is both expansive and technical.<sup>78</sup> Key features of the SAM process include screening,<sup>79</sup> problem definition and scoping,<sup>80</sup> applying sustainability tools,<sup>81</sup> and conducting a “trade-off and synergy analysis.”<sup>82</sup> An EPA publication, *Sustainability Analytics: Assessment Tools & Approaches*,<sup>83</sup> provides a granular look at the EPA’s current sustainability tool box. Economic tools include benefit-cost analysis, eco-efficiency analysis, ecosystem service valuation, and green accounting.<sup>84</sup> Social equity tools include collaborative problem-solving, design charrettes, environmental justice analysis, futures methods, health impact assessment, segmentation analysis, social impact analysis, and social network analysis.<sup>85</sup> Environmental tools include chemical alternatives assessment, environmental

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include it as one of the Key Recommendations to the EPA, and to specifically define the social pillar as “social pillar (including human health).”

<sup>75</sup> The EPA followed through on this suggestion. See *Sustainability Analytics*, *supra* note 67, at 10 (referring to economic, environment, and social systems).

<sup>76</sup> See GREEN BOOK, *supra* note 71, at 45-48.

<sup>77</sup> *Id.* at 48. Materiality is a key term in sustainability discourse, and is used frequently in the corporate sector. See FARVER, *supra* note 18, at 172-74.

<sup>78</sup> See *id.* at 53, 56.

<sup>79</sup> *Id.* at 56-58.

<sup>80</sup> *Id.* at 58-59.

<sup>81</sup> *Id.* at 59.

<sup>82</sup> *Id.* at 66. This analysis will assist the agency in determining how it can maximize the synergies between economic, environmental, and social benefits while minimizing conflicts.

<sup>83</sup> *Sustainability Analytics*, *supra* note 67, at 8.

<sup>84</sup> *Id.* at 20-32. For each indicator, *Sustainability Analytics* provides a description of the tool, an explanation of how the tool is relevant to sustainability and how it is applied, the strengths and weakness of the tool, and links to examples of how the tool was previously used and further information.

<sup>85</sup> *Id.* at 33-53.

footprint analysis, exposure assessment, green chemistry, green engineering, integrated assessment modeling, life-cycle assessment, resilience analysis, risk assessment, and sustainability impact assessment.<sup>86</sup> These lists provide a snapshot of EPA's sustainability analytics jargon and demonstrate the growing sophistication of the EPA's sustainability assessment dialect.

As is true for any entity pursuing sustainability, the dimensions of concern for federal agencies begin with the three pillars and the temporal dimensions associated with intergenerational equity. Agencies are additionally re-configuring operational dimensions by relaxing departmental boundaries, collaborating with more individuals, and increasing the number of tools they use to develop new programs and implement existing ones. The EPA, for example, is considering cross-media approaches as it integrates sustainability,<sup>87</sup> replacing media-specific and single disciplinary approaches "with a more system-based approach that integrates multiple media, with multiple objectives in social, environmental, and economic pillars and considers both short-term and long-term consequences."<sup>88</sup> To do so, the agency will need to reach out to, and perhaps employ, multi-disciplinary professionals, including leaders in sustainability management, scientists, and professionals from other disciplines, to help the agency improve and refine its sustainability assessment and management system.<sup>89</sup> The dimensions of EPA's stakeholder outreach are also expanding to assure maximum collaboration in the screening process.<sup>90</sup> Likely stakeholders include other federal agencies and state and local governments,<sup>91</sup> and may additionally include regional interests, NGOs, tribes, and business and industry.<sup>92</sup>

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<sup>86</sup> *Id.* at 54-92.

<sup>87</sup> GREEN BOOK, *supra* note 71, at 35.

<sup>88</sup> *Id.* at 94.

<sup>89</sup> *Id.* at 6. Although the NRC admits that EPA currently has expertise among its staff in the basic areas of sustainability, it feels the agency should nevertheless reach out to other professionals to obtain greater insight.

<sup>90</sup> *Id.* at 58.

<sup>91</sup> *Id.* There already exists a federal partnership for sustainable communities, which joins together the EPA and the federal Departments of Transportation and Housing and Urban Development. *Id.* at 101-02.

<sup>92</sup> *Id.* The value of these stakeholder partnerships goes beyond informing sustainable decision-making. They open the door to collaboration on financing projects and assist in sharing best practices. *Id.* at 101-02.

Dimensions in the field of analytics are also changing, as agencies refine existing tools and develop new models to assess impacts on the economic, environmental, and social pillars. The use of multi-dimensional indicators and metrics is on the rise,<sup>93</sup> and agencies are improving the tools used to produce metrics. At the EPA, risk assessment is undergoing change to better reflect sustainability's dimensions, "widen[ing] the risk paradigm[] to include the context in which the analysis is performed, the early consideration of a broad range of decision options, and cumulative threats of multiple social, environmental, and economic stressors to health and the environment."<sup>94</sup> Risk assessment and risk management tools are also expanding to better reflect cumulative exposures, not only from multiple chemicals, but from psychological stressors as well.<sup>95</sup>

### B. *State and Local Governments*

Numerous states, counties, and municipalities have embraced a broad view of sustainability, adopting benchmarks that account for impacts to their economies, ecosystems, and constituents over the near and long term.<sup>96</sup> Two areas where the state and local dialect of sustainability is particularly rich include land use planning and climate change.<sup>97</sup> Land use planning, once dominated by comprehensive planning and zoning, has been infiltrated by "terms like 'sustainable communities/cities/regions,' 'livable communities/cities/regions,' 'smart growth,' 'new urbanism,' 'transit-oriented development,' 'green building/housing/neighborhoods/cities,' and 'brownfields ...'"<sup>98</sup>

<sup>93</sup> See *A Framework for Sustainability Indicators*, *supra* note 72, at 13-14 (explaining that some of these indicators can be used at "multiple scales").

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 83. Other sustainability-induced changes in traditional RA/RM modeling include adding qualitative approaches to address more impacts, and revising the goal of risk management to one of maximizing benefit as opposed to minimizing harm. *Id.* at 87.

<sup>96</sup> ACTING AS IF TOMORROW MATTERS, *supra* note 8, at 85.

<sup>97</sup> Another piece of the sustainability dialect of local governments is devoted to K-12 education. See, e.g., Carmela Federico & Jamie Cloud, *Kindergarten through Twelfth Grade Education: Fragmentary Progress in Equipping Students to Think and Act in a Challenging World*, in AGENDA FOR A SUSTAINABLE AMERICA, *supra* note 8, at 109-21.

<sup>98</sup> Jonathan D. Weiss, *Local Governance and Sustainability: Major Progress, Significant Changes*, in AGENDA FOR A SUSTAINABLE AMERICA 43, 44.

Smart Growth focuses primarily on mixed land use, conservation of green space, sustainable transportation, and community engagement.<sup>99</sup> Its objectives are reflected in brownfield laws, which facilitate the redevelopment of contaminated industrial sites,<sup>100</sup> and in green building policies including LEED standards, which are now in effect in nearly every major metropolitan area in the United States.<sup>101</sup> Assured water supply laws, which require real estate developers to demonstrate that there will be sufficient water of good quality to support proposed development projects,<sup>102</sup> are another component of smart growth. The language of environmental justice<sup>103</sup> and sustainable transportation permeates smart growth as well. Environmental justice initiatives include affordable housing, public participation, and facility siting requirements that assure a fair distribution of environmental harms.<sup>104</sup> Sustainable transportation policies seek to shrink urban areas, reduce automobile use, preserve ecosystems and green space, and create livable, walkable communities.<sup>105</sup>

<sup>99</sup> Patricia Salkin, *Land Use: Blending Smart Growth with Social Equity and Climate Change Mitigation*, in AGENDA FOR A SUSTAINABLE AMERICA 349, 350.

<sup>100</sup> Joel B. Eisen, *Brownfields Development: From Individual Sites to Smart Growth*, in AGENDA FOR A SUSTAINABLE AMERICA, *supra* note 8, at 57-58. Brownfield laws, now adopted by nearly all of the states, spur smart growth by remediating waste-laden sites and putting back to use. *Id.* at 59 (explaining that the EPA views brownfield development as “an essential component of smart growth”).

<sup>101</sup> Ira Robert Feldman, *Business and Industry: Transitioning to Sustainability*, in AGENDA FOR A SUSTAINABLE AMERICA 71, 79. The LEED standard and rating system furthers sustainability by reducing resource use from cradle to grave, while providing people with pleasant places to work and live. *Id.* at 78.

<sup>102</sup> Lincoln L. Davies, *Assured Water Supply Laws in the Sustainability Context*, 4 GOLDEN GATE U. ENVTL. L.J. 167, 173 (2010). These laws reflect the environmental objectives of smart growth and sustainable land use by considering present and future impacts on water resources. *Id.* at 170 (finding that assured water supply laws address sustainability to varying degrees).

<sup>103</sup> Environmental justice aims to assure the fair treatment of all people in terms of exposure to pollutants and hazardous materials, and to afford them opportunities to become meaningfully involved in decisions that affect them. Salkin *supra* note 99, at 354 (quoting the EPA’s definition of environmental justice). The EPA has taken steps to integrate environmental justice policies in its programs, and has also worked with other agencies to further its objectives. Federico Cheever and Ward J. Scott, *Sustainable Forestry: Moving From Concept to Consistent Practice*, in AGENDA FOR A SUSTAINABLE AMERICA 285, 295.

<sup>104</sup> Salkin, *supra* note 99, at 355.

<sup>105</sup> Catherine L. Ross et al., *Measuring Regional Transportation Sustainability: An Exploration*, 42/43 URB. LAW. 67, 69, 85 (2011) (finding that some metropolitan areas

Smart growth has, to some extent, been eclipsed by state and local climate change policies,<sup>106</sup> a shift that has generated a dialect of its own. States have adopted renewable energy portfolios (“RPS”)<sup>107</sup> and energy efficiency resource standards.<sup>108</sup> Approaches aimed at making buildings more energy efficient and incentivizing the use of renewable energy by the private sector are also common.<sup>109</sup> A majority of states have greenhouse gas inventories and formal climate action plans,<sup>110</sup> and a few require climate change assessments in mandatory state environmental reviews.<sup>111</sup> More aggressive approaches to climate change include California’s cap and trade program and the Regional Greenhouse Gas Initiative in the Northeast and Mid-Atlantic regions.<sup>112</sup>

State and local dimensions of sustainability, like those at the federal level, include not only the core dimensions of sustainability, but also newly integrated programs, expanded partnerships, and more diverse tools and solutions for sustainability. However, unlike the federal dimensions, state and local dimensions are more organic and bottom-up. In moving toward sustainability, state and local governments are integrating new areas of focus into existing programs. Smart growth is a prime example; its policies have permanently changed how real estate is developed at the state and local levels.<sup>113</sup> Land use planners are also incorporating climate change policy into

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are having success in developing transportation policies that address the three pillars of sustainability).

<sup>106</sup> See Salkin, *supra* note 99, at 357 (quoting experts who nevertheless claim that following smart growth strategies will achieve major reductions in greenhouse gas emissions); see also Ira Robert Feldman, *supra* note 101, at 74. State and local governments clearly see climate policy as a major driver of sustainability. *Id.* at 76 (noting the 1,000-plus mayors who have signed onto the U.S. Mayors’ Climate Protection Agreement).

<sup>107</sup> An RPS sets a percentage of overall state energy use that comes from renewable energy sources. *Id.* at 89.

<sup>108</sup> An energy efficiency resource standard requires utilities within a state to cut energy use by a set percentage. More than half the states have enacted this type of standard. *Id.*

<sup>109</sup> *Id.* at 90.

<sup>110</sup> *Id.* at 75.

<sup>111</sup> *Id.* Modeled after the National Environmental Policy Act, state mini-NEPAs require an assessment of the environmental impacts of state actions. Massachusetts and New York are the only two states that have amended their laws to include a climate change assessment.

<sup>112</sup> *Id.* at 92.

<sup>113</sup> See *e.g.*, notes 99-104 and accompanying text.

their decision-making by increasing their focus on building energy efficiency and vehicle miles travelled.<sup>114</sup>

New partnerships at multiple levels are being formed as state and local governments implement policies for sustainability. Agencies are coordinating with other government departments within their own jurisdictions.<sup>115</sup> Partnerships at the regional level are common, too,<sup>116</sup> and are expected to grow in number as state and local leaders come to appreciate the scale of social-environmental systems.<sup>117</sup> State and local governments are also partnering with the EPA and other federal agencies through initiatives such as the Partnership for Sustainable Communities, a federal collaboration of the EPA, the Department of Housing and Urban Development, and the Department of Transportation.<sup>118</sup> These new collaborative dimensions are not only intra- and inter-governmental. Increasingly, localities also are involving community residents in development decisions by entering into community benefit agreements (“CBA”) that address the socio-economic concerns of communities where major developments are proposed.<sup>119</sup>

<sup>114</sup> See *ACTING AS IF TOMORROW MATTERS*, *supra* note 8, at 75.

<sup>115</sup> Salkin, *supra* note 99, at 352 (describing coordination between Massachusetts’ Office for Commonwealth Development and the Commonwealth’s Office of Environmental Affairs, Department of Housing and Community Development, Office of Transportation, and certain energy programs).

<sup>116</sup> Weiss, *supra* note 98, at 48 (describing a regional smart growth partnership in Utah). See also Ross et al., *supra* note 105, at 72 (noting that “we should define and manage sustainability beyond existing political boundaries”).

<sup>117</sup> See Craig Anthony (Tony) Arnold, *Resilient Cities and Adaptive Law*, 50 IDAHO L. REV. 245, 250. Arnold’s article was included in a symposium issue devoted to Resilient Cities. He believes that “[t]he concept of resilience is increasingly replacing the concept of sustainability as a desired policy goal and way of evaluating collective behaviors shaping interdependent environmental conditions and social conditions, including economic, political, and socio-culture conditions.” *Id.* at 246 (citing Robin Kundis Craig & Melinda Harm Benson, *Replacing Sustainability*, 46 AKRON L. REV. 841, 862 (2013)). His recognition of the importance of regional partnerships is no less convincing when speaking of sustainability.

<sup>118</sup> The Partnership coordinates smart growth funding and provides numerous other resources to local communities. *ACTING AS IF TOMORROW MATTERS*, *supra* note 8, at 71. EPA also has its own smart growth office that provides various resources to state and local governments. *Id.* at 73.

<sup>119</sup> Salkin, *supra* note 99, at 349 (noting that 50 CBAs had been documented by 2009). Recently, a CBA was brokered by the city of Pittsburgh, (developer), and a local

Partnerships are also forming between governments and private entities, including local churches and businesses.<sup>120</sup>

As is true of the federal government, state and local governments are developing more diverse indicators, targets, and metrics for sustainability,<sup>121</sup> expanding the technical dimensions of their decision-making processes. They are also exploring new legal dimensions by enacting legal mandates and laws that remove hurdles to sustainability,<sup>122</sup> and applying economic development laws in ways that further its objectives.<sup>123</sup> Through all of their sustainability efforts, state and local governments are transforming the way that people transport themselves, infrastructure is built, and energy is produced.<sup>124</sup>

### C. Business and Industry

No matter how comprehensive a corporate sustainability strategy may be, adherents in the corporate sector often emphasize the fundamental importance of being fluent in the general language of business.<sup>125</sup> Without

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environmental justice community, in advance of a major development of property that was the former site of the Pittsburgh Penguins arena. Mark Belko, *Penguins, Pittsburgh reach agreement on redeveloping former Civic Arena site*, PITTSBURGH POST-GAZETTE, September 9, 2014.

<sup>120</sup> Weiss, *supra* note 98, at 48.

<sup>121</sup> ACTING AS IF TOMORROW MATTERS, *supra* note 8, at 85

<sup>122</sup> *Id.* at 177-80 (also mentioning economic development laws that trigger job growth).

<sup>123</sup> *Id.* at 178 (noting that State and local leaders have applied traditional tools such as preferential tax treatment, siting assistance and incentives, and workforce development assistance to attract clean energy facilities).

<sup>124</sup> See, e.g., Trip Pollard, *Transportation: Challenges and Choices*, in AGENDA FOR A SUSTAINABLE AMERICA, *supra* note 8, at 369 (noting increased state and local funding for alternate modes of travel, including car, transit, bicycles, and walking); ACTING AS IF TOMORROW MATTERS, *supra* note 8, at 182-83 (discussing the variety of approaches state and local governments fund smart growth and green building).

<sup>125</sup> See, e.g., William R. Blackburn, *Sustainability as a Business Operating System*, 19 NAT. RESOURCES & ENV'T 27, (2004) (suggesting that sustainability advocates within an organization "should use the language of business"); Unruh, *supra* note 13. Unruh promotes the development of "sustainability insurgents within organizations, who must understand and use the jargon of each functional area of the business in order to "translate[] corporate sustainability goals into the local functional discussions and thinking." *Id.* For further detail about Unruh's "sustainability insurgency," see his two



that basic skill, the larger topic of “Green Business,”<sup>126</sup> or “Corporate Sustainability,”<sup>127</sup> cannot be adequately addressed. The sustainability dialect that overlays the traditional language of business is distinctive, particularly the language associated with corporate standards of conduct, accountability, and business entities.

In obligating themselves to sustainability, corporations seldom refer to the “three pillars;” instead, they routinely speak of the three P’s (people, profit, planet) or the triple bottom line, phrases that describe the three foundations of sustainability.<sup>128</sup> In adjusting their standards of conduct to account for sustainability’s demands, firms have focused on corporate social responsibility (“CSR”),<sup>129</sup> where the dialect of corporate sustainability is well represented. Companies use various approaches to facilitate the transition to sustainability, such as the Gearing Up Framework.<sup>130</sup> They have also

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later blog postings: *The Sustainability Insurgency: Missives from the Front Lines, Part 1*, available at <http://sloanreview.mit.edu/article/the-sustainability-insurgency-missives-from-the-frontlines-part-1/>; and *The Sustainability Insurgency: Missives from the Front Lines, Part 2*, *supra* note 64.

<sup>126</sup> See Dennis D. Hirsch, *Green Business and the Importance of Reflexive Law: What Michael Porter Didn’t Say*, 62 ADMIN. L. REV. 1063 (2010). Hirsch’s definition of “Green Business” captures the economic, environmental and social components of sustainability. See *id.* at 1072.

<sup>127</sup> See Mel Wilson, *Corporate Sustainability: What Is It and Where Does It Come From?*, IVEY BUSINESS JOURNAL, SOCIAL RESPONSIBILITY 152 (March/April 2003) (defining “corporate sustainability” to include profitability, environmental protections, and social justice).

<sup>128</sup> See Robert A. Katz and Antony Page, *The 2012 Randolph W. Thrower Symposium Innovation for the Modern Era: Law, Policy, and Legal Practice in a Changing World*, 62 EMORY L.J. 851, 873 (2013); Judd Sneirson, *Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 991 (2009).

<sup>129</sup> See, e.g., Silvia M. Garrigo, *Corporate Responsibility at Chevron*, 31 UTAH ENVTL. L. REV. 129, 133 (2011) (noting that Chevron has integrated corporate responsibility throughout its operations); Martin Petrin, *Reconceptualizing the Theory of the Firm – From Nature to Function*, 118 PENN. ST. L. REV. 1, 51 (adopting a functional approach to support corporate social responsibility duties); David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 525 (2011) (adopting a “sustainability approach to CSR,” which considers a firm’s long-term viability).

<sup>130</sup> *Id.* at 993 (citing SustAinability Ltd., *Gearing Up: From Corporate Responsibility to Good Governance and Scalable Solutions* 34-37 (2004) available at [http://www.unglobalcompanct.org/docs/news\\_events/8.1/gearing-up.pdf](http://www.unglobalcompanct.org/docs/news_events/8.1/gearing-up.pdf)). Nike adopted this framework in expanding its CSR. *Id.* at 994.

developed strategies to implement enhanced standards of conduct and are adopting detailed Sustainability Operating Systems (“SOS”),<sup>131</sup> or Sustainability Management Systems (“SMS”).<sup>132</sup> SMS components have unique titles, such as “supply chain” or “value chain” management, which inject sustainability thinking into all “activities and processes performed by a business in order to produce its particular product or service.”<sup>133</sup>

Firms account for their performance of CSR and SMS metrics in periodic reports,<sup>134</sup> which often refer to national or international standards and third-party certifications such as ISO 14001 and 26000, which deal with environmental and social responsibilities, respectively.<sup>135</sup> Other relevant ISO standards deal with energy management systems and risk management.<sup>136</sup> SMS reporting may also be tied to Global Reporting Initiative (“GRI”) indicators,<sup>137</sup> which aim to place the three pillars of sustainability on an equal footing.<sup>138</sup> GRI indicators are available for environmental performance, labor practices, social impacts, and various aspects of economic performance.<sup>139</sup>

<sup>131</sup> Blackburn, *supra* note 125, at 27.

<sup>132</sup> FARVER, *supra* note 18, at 143.

<sup>133</sup> *Id.* at 159. Some businesses refer to this piece of a SMS as a resource development strategy. See, e.g., *Intel Cuts Conflict Minerals from Supply Chain*, GREENWIRE (July 7, 2014), available at <http://www.eenews.net/gw/2014/07/07>.

<sup>134</sup> Firms that adopt sustainability-based CSR principles ideally remain true to them; however, those who fail to do so are apt to be accused of “greenwashing,” a term describing companies that “claim to be socially responsible, convince many people to believe and rely upon that claim, and yet act in a way that is anything but socially responsible.” Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing after the BP Oil Disaster*, 85 TUL. L. REV. 983, 987 (2011) (presenting an account of BP’s greenwashing of its sustainability efforts in the context of the Deepwater Horizon oil spill).

<sup>135</sup> *Environmental Management Systems*, ISO/IEC 14001:2004 (ISO 14001:2004 *Environmental Management Systems* is currently under review and open for comment. The final version is expected by the end of 2015); *Social Responsibility*, ISO/IEC 26000:2010. See <http://www.iso.org/iso/home/standards.htm>. ISO standards are issued by the Geneva-based International Organization of Standardization.

<sup>136</sup> FARVER, *supra* note 18, at 9. ISO 50001 and 31000 address these issues. *Energy Management System*, ISO/IEC 50001:2011; *Risk Management*, ISO/IEC 31000:2009.

<sup>137</sup> FARVER, *supra* note 18, at 98-99. Headquartered in Amsterdam, the GRI is an outgrowth of the Coalition for Environmentally Responsible Economies (CERES), and is now considered a prominent organization in sustainability indicators. *Id.*

<sup>138</sup> *Id.* at 124.

<sup>139</sup> *Id.* at 99, 114-15, 125; The GRI reporting framework is available at <https://www.globalreporting.org/reporting/reporting-framework->

The dialect of corporate sustainability also reflects changes in business entity terminology. New legal structures are emerging, due, in part, to the social pillar of sustainable development.<sup>140</sup> Low-profit Limited Liability Companies (“L3C”), which are recognized in a growing number of states, operate primarily for a charitable purpose with profit being secondary.<sup>141</sup> The benefit corporation, a profit/non-profit hybrid that is more closely aligned with the objectives of sustainability,<sup>142</sup> authorizes companies to make a profit while simultaneously making a “material positive impact on society and the environment.”<sup>143</sup> Benefit corporations are required to have a

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overview/Pages/default.aspx. Firms can additionally report their progress under third-party certifications including EPA’s Climate Challenge and Waste Wise Programs and various trade association programs. *See* ACTING AS IF TOMORROW MATTERS, *supra* note 8, at 147. Manufacturers may report ratings under the Energy Star and Electronic Product Environmental Assessment Tool (EPEAT) programs. *See, e.g., Environmental Responsibility Report*, 2014 Progress Report, Covering 2013, at 13 [hereinafter *Apple Report*].

<sup>140</sup> Katz & Page, *supra* note 128, at 851.

<sup>141</sup> Evangeline Gomez, *The Rise of the Charitable For-Profit Entity*, FORBES 2 (Jan. 13, 2012), available at <http://www.forbes.com/sites/evangelinagomez/2012/01/13/the-rise-of-the-charitable-for-profit-entity>. At the time this article was published, nine states recognized the LC3. *Id.* (noting that LC3’s and benefit corporations were expected to generate \$120 billion in potential investments).

<sup>142</sup> Katz & Page, *supra* note 128, at 879-880 (internal citations omitted) (noting that “the privately supplied Certified B Corp and the state-enacted benefit corporation come closest to providing a legal prototype and framework for sustainable or triple-bottom-line businesses.”). A Low-profit Limited Liability Company (L3C), is a for-profit business form that is directed towards making a positive social impact rather than focusing on economic or financial returns. The L3C’s articles of organization, by law, require the organization to adhere to standards for program-related investment (PRI). PRI’s can take a variety of forms, including loans, loan guarantees, or equity investments, so long as the investment is primarily made for a charitable or public purpose. Aside from the requirement to mirror standards for program-related investing, L3Cs are similarly structured to a LLC, shielding its owners from any debts of their enterprise and giving them flexibility in governance and tax planning. Marc J. Lane, *Social Enterprises: A New Business Form Driving Social Change*, 16:3 ABA: THE YOUNG LAWYER (December 2011).

<sup>143</sup> Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY’S L. J. 617, 620 (2013) (internal citations omitted). Companies can choose between incorporating as a traditional for-profit entity and applying for certified B Corporation status from B Lab, or incorporating as a benefit corporation under state law, an option that is only possible in states that have enacted some form of the Model Benefit Corporation Legislation (MBCL), which was promulgated by B Lab. *Id.* at 620-21 (reporting that, as of 2013, twelve states had adopted the MBCL in one form or another). The law further provides that state corporate law governs benefit corporations except as otherwise set forth in the

purpose of “general public benefit,” and management decisions must take into account societal and environmental considerations.<sup>144</sup>

The cross-disciplinary demands of sustainability are expanding the dimensions of business activities on several fronts. Business owners are looking beyond internal operations to assess community-based dimensions, including the quality of schools, healthcare, housing, and transportation in the communities where their businesses are located.<sup>145</sup> Similar dimensional adjustments are being made in terms of how businesses think about stakeholder groups such as employees.<sup>146</sup> Companies that commit to a SMS will often involve all of their employees in the development and implementation of the new management system, forcing them out of individual offices and specialized departments to participate in the larger, integrative enterprise.<sup>147</sup> Sustainability’s environmental and social equity components also expand the usual list of corporate stakeholders to include government agencies, community groups,<sup>148</sup> labor unions, and the media.<sup>149</sup>

New dimensions in production and compliance are also emerging. Product design, once focused solely on production efficiency, now brings engineers and manufacturers together with customers and regulatory agencies

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MBCL. *Id.* at 627.

<sup>144</sup> *Id.* at 628 (citing MODEL BENEFIT CORP. LEGIS. § 301 (a) (2012)). The legislation seeks, in part, to provide a choice of entity for firms that fear traditional CSR theories are restricted by shareholder-wealth-maximization principles. *Id.* at 626-27.

<sup>145</sup> FARVER, *supra* note 18, at 123 (explaining that good schools, adequate health care, housing and transportation are key to a strong pool of employees, and that “[t]hese benefits are not always included ... on a business financial statement).

<sup>146</sup> Wilson, *supra* note 127 (noting that traditional stakeholders include “shareholders and investors, employees, customers, and suppliers”).

<sup>147</sup> Blackburn, *supra* note 125, at 29; FARVER, *supra* note 18, at 144 (noting that a “robust SMS ... support[s] teamwork, break[s] down silos in the organization, and improve[es] communication and coordination in accordance with the overall vision of the company”). Suzanne Farver, an expert in corporate sustainability management, endorses a systems approach that “embed[s] sustainability throughout a company,” extending the stakeholder role of employees beyond their specific jobs to include their participation in the company’s overarching sustainability effort. *Id.* at 36.

<sup>148</sup> Herman F. Greene, *Hot, Crowded, and Not-So-Flat: The Changing Climate for Corporations*, 44 WAKE FOREST L. REV. 799, 818-19 (2009); David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 531 (2011) (discussing CRS expenditures for the local community that may be justified under a SMS).

<sup>149</sup> FARVER, *supra* note 18, at 78.

to arrive at designs that are not only efficient, but also socially and environmentally sound.<sup>150</sup> Companies are also moving beyond compliance with legal mandates,<sup>151</sup> setting targets based on demanding ISO and GRI standards and expanding annual reporting to account for their performance.<sup>152</sup>

The dimensions of corporate collaborations are changing in other ways as well. Instead of making charitable contributions to social organizations, companies are actively participating in improving the infrastructure and social fabric of the communities where they exist.<sup>153</sup> Other businesses are partnering with trade associations in new ways, taking advantage of voluntary environmental certification programs and technical expertise that some associations now provide.<sup>154</sup> Collaboration with competing firms within the same industry in order to achieve larger-scale sustainability outcomes is also possible.<sup>155</sup>

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<sup>150</sup> *Id.* at 197-201.

<sup>151</sup> See e.g., Judd F. Sneirson, *The Sustainable Corporation and Shareholder Profits*, 46 WAKE FOREST L. REV. 541,543 (2011) (explaining that sustainable businesses may seek to be “more than minimally compliant with environmental regulations”); FARVER, *supra* note 18, at 96-97 (explaining that “responsible management includes not only meeting minimum regulations... but going beyond those rules and guidelines to encompass vision for a better world...”). As reflected in its 2013 Environmental Responsibility Report, Apple exemplifies this compliance-plus dimensional thinking. Among other initiatives, it is voluntarily seeking to build a data center that will be fully powered by renewable energy. *Apple Report*, *supra* note 139, at 6.

<sup>152</sup> See FARVER, *supra* note 18, at 181. Farver states that the number of corporate sustainability reports has “increased by leaps and bounds” over the past 20 years, and that these reports are becoming “a major part of corporate communications.” *Id.* at 183. Some companies rely on third-party certification and audits to verify their achievements. *Id.* at 184. For example, Apple’s 2013 Environmental Responsibility Report includes third-party verification of some of its environmental data, including information related to its carbon footprint. *Apple Report*, *supra* note 139, at Appendix B.

<sup>153</sup> See Garrigo, *supra* note 129, at 129-30; Hirsch, *supra* note 126, at 1083 (describing environmental upgrades made in a proposed pulp mill resulting from community outreach).

<sup>154</sup> See ACTING AS IF TOMORROW MATTERS, *supra* note 8, at 147. Other helpful organizations include the U.S. Business Council on Sustainable Development and the U.S. Green Building Council. *Id.* at 299.

<sup>155</sup> Matthew Bodie presents the idea of industry-wide sustainability in an article that examines NASCAR’s greening efforts. Matthew Bodie, *NASCAR Green: The Problem of Sustainability in Corporations and Corporate Law*, 46 WAKE FOREST L. REV. 491 (2011).

D. *Agriculture*

The challenges the nation's agricultural sector faces are numerous,<sup>156</sup> underscoring the need for robust sustainable agriculture policies. Although sustainable agriculture has not become mainstream,<sup>157</sup> its dialect is taking shape. The National Research Council's ("NRC") 2010 report on sustainable agriculture provides a useful guide in this regard, and reveals a dialect focused on systems, tools for environmental improvement, and food safety and security.<sup>158</sup>

The NRC report envisions sustainability as a process to guide progress toward agricultural sustainability,<sup>159</sup> and endorses a systems approach that focuses on the "integrative practices that are well-defined and ... located within operating farm environments."<sup>160</sup> There is a continuum of farm environments in the United States, ranging from conventional and industrial agriculture systems<sup>161</sup> to ecologically-based farming systems,

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<sup>156</sup> National Research Council, TOWARD SUSTAINABLE AGRICULTURAL SYSTEMS IN THE 21<sup>ST</sup> CENTURY 54-74 (2010) [hereinafter TOWARD SUSTAINABLE AGRICULTURAL SYSTEMS]. The largest number of farms are small family enterprises that produce less than ten percent of the nation's food. *Id.* Mid-size farms produce 16.5 percent; and large, multi-million dollar farms, comprise only two percent of the nation's farms but account for nearly half of the total farm sales in the United States. *Id.* at 49-51 (additionally explaining that multi-million dollar farms enjoy a competitive advantage over smaller farms).

<sup>157</sup> *Id.* at 31. Despite there being no national policy for sustainable agriculture, there is a definition for it, which the 1990 farm bill defined as, [a]n integrated system of plant and animal production practices having a site-specific application that will, over the long term, satisfy human food and fiber needs, enhance environmental quality and the natural resources base upon which the agricultural economy depends; make the most efficient use of nonrenewable resources and on-farm/ranch resources; and integrate, where appropriate, natural biological cycles and controls; sustain the economic viability of farm/ranch operations; and enhance the quality of life for farmers/ranchers and society as a whole. 7 U.S.C. § 3103(19) (2008); *see also* Megan Galey & Brian Endres, *Locating the Boundaries of Sustainable Agriculture*, 17 NEXUS: CHAP. J.L. & POL'Y 3, 16 (2011-2012) (further describing programs introduced in the 2008 Farm Bill that promote sustainability).

<sup>158</sup> TOWARD SUSTAINABLE AGRICULTURAL SYSTEMS, *supra* note 156, at 16.

<sup>159</sup> *Id.* at 32, 23.

<sup>160</sup> *Id.* at 253.

<sup>161</sup> *Id.* at 19-20. Conventional and Industrial farms use conventional methods of crop farming, including the use of synthetic pesticides, herbicides, and fertilizers. *Id.*

which include organic and biodynamic farms.<sup>162</sup> In working toward sustainability, these systems need to be oriented toward four goals: producing enough food to satisfy human food and fuel needs; enhancing the quality of the environment and natural resource base on which farms depend; sustaining a strong farm economy; and improving the lives of the farmers, farm laborers, and members of surrounding communities.<sup>163</sup>

A significant portion of sustainable agriculture's dialect can be found in the terminology associated with environmental sustainability and food security. The list of practices and tools that further environmental objectives is particularly extensive. Soil management tools include conservation tillage and cover cropping.<sup>164</sup> Practices aimed at achieving crop and vegetation diversity include crop rotation, intercropping, cultivar mixtures, and non-crop vegetation management.<sup>165</sup> Water-use management tools include irrigation scheduling, various irrigation systems, water reuse, and small dams.<sup>166</sup> A different assortment of tools, including drainage water management,

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<sup>162</sup> These "ecological" or "ecosystem" farming operations rely on natural processes within the farm system and synergies from the surrounding landscape and community to build efficiency and resilience. *Id.* at 20. Organic farm systems do not use synthetic pesticides, fertilizers, or sewage sludge; biodynamic farm systems rely on eight soil amendments, an astronomical calendar, and "spiritual forces in nature." *Id.* at 21.

<sup>163</sup> *Id.* at 23.

<sup>164</sup> Conservation tillage reduces soil disturbance and helps to reduce soil erosion and soil degradation. *Id.* at 86. Cover cropping, which uses various vegetative crops in rotation with cash crops, has been shown to improve soil quality and increase crop yields. *Id.* at 94.

<sup>165</sup> Rotating different crops on the same farm field can help control weeds and improve soil quality. *Id.* at 99. Intercropping, which involves planting more than one crop in the same field, can reduce crop loss and enhance ecological services. *Id.* at 103. Cultivar mixtures refer to different varieties of the same crop species. They have been shown to increase crop yield and decrease susceptibility to disease. *Id.* at 104. Noncrop vegetation management includes the use of riparian buffers, hedgerows, woodlots, or other noncrop plant formations to improve biodiversity and help control pests. *Id.* at 105. Other tools mentioned by the NRC that improve crop diversity include plant breeding and genetic modification, and the use of molecular markers in the development of cultivars. *Id.* at 106-08.

<sup>166</sup> *Id.* at 110-17. Water-conserving irrigation practices include gravity systems, sprinkler irrigation, trickle or drip irrigation, and regulated deficit irrigation. All of these techniques can reduce water use. *See generally id.*

wetlands, and buffers, preserves the quality of surface and ground water.<sup>167</sup> Additional practices provide adequate nutrients to support crop growth; prevent excess runoff;<sup>168</sup> manage weeds, pests, and disease;<sup>169</sup> and efficiently manage animal production, welfare, and health.<sup>170</sup> “Food security,” the overarching goal of productivity,<sup>171</sup> employs a terminology focused on food quantity, access,<sup>172</sup> and “food justice” for all.<sup>173</sup> Tools that further those ends include farmers markets, CSA’s, farm-to-school programs, and food subsidies for low-income populations.<sup>174</sup>

<sup>167</sup> The NRC defines drainage water management as a “practice in which the outlet from a conventional drainage system is intercepted by a water control structure that effectively functions as a weir.” *Id.* at 117. By regulating drainage, these practices improve productivity and enhance the environment. *Id.* The use of natural or man-made wetlands can help filter contaminants from farm runoff. *Id.* at 119. Vegetated buffers also improve water quality and additionally support biodiversity. *Id.* at 121.

<sup>168</sup> *See id.* at 122-35 (describing the use of mass balances, soil and tissue sufficiency tests, and best management practices involving nutrient inputs, legumes, animal manure, compost, precision agriculture, and nanotechnology).

<sup>169</sup> These practices include managing the entire “crop-weed-disease-pest complex,” by using integrated pest management, disease resistant cultivars, and biofumigation, among other practices. *See id.* at 137-50.

<sup>170</sup> *Id.* at 150-61 (describing practices that focus on animal breeding and nutrition, housing, antibiotic use, and animal identification).

<sup>171</sup> *Id.* at 207. Food security is global concern. A recent report suggests that making changes to farming practices in the United States, India, Pakistan, and China would result in large gains for food security and sustainability. *See* Joshua Learn, *Focus on Key Areas to Ease Resource Impacts, Boost Food Security – Study*, GREENWIRE (Friday July 18, 2014).

<sup>172</sup> TOWARD SUSTAINABLE AGRICULTURAL SYSTEMS, *supra* note 156, at 207 (noting that the goal of food access requires food to be affordable and available locally).

<sup>173</sup> *See generally* Kimberly Morland & Steve Wing, *Food Justice and Health in Communities of Color*, in GROWING SMARTER 171-86 (Robert D. Bullard, ed. 2007)(generally reporting disparities in access to restaurants and supermarkets in low-wealth communities).

<sup>174</sup> TOWARD SUSTAINABLE AGRICULTURAL SYSTEMS, *supra* note 156, at 207-08. Food subsidy programs include the Supplemental Nutrition Assistance Program (SNAP) and the Special Nutritional Supplemental Program for Women, Infants, and Children (WIC). Growing Power, a non-profit organization co-founded by Will Allen, has become a prominent enterprise in the food security field. The organization transforms inner-city land into farming operations that provide food for nearby low-income residents who would otherwise have to travel long distances to purchase food. *See What is Sustainable Agriculture?*, Sustainable Agriculture and Education (SARE), available at <http://www.sare.org>.



The NRC's vision for sustainable agriculture is unique in terms of dimensions because it places food productivity on equal footing with economic, environmental, and social goals, in effect adding a fourth pillar to the usual three. Further, each of the four primary dimensions has a series of related objectives which comprise a subset of related dimensions. For example, the food production goal includes the obvious objective of farm productivity and food output, but also includes dimensions related to food quality, safety, affordability, and availability.<sup>175</sup> The environmental goal includes predictable dimensions related to air and water quality, but additionally includes dimensions that focus on soil quality and animal health and welfare. Dimensions associated with the economic goal transcend the profitability of the farm business to include the security of farm workers and the surrounding community; and the social goal looks to the quality of life of farmers and their families,<sup>176</sup> as well as additional dimensions related to the health and welfare of farm laborers and the well-being of the surrounding communities and society generally.<sup>177</sup> The NRC also lists three qualities of sustainable agricultural systems, which are distinct from the four primary goals, adding ends-oriented dimensions into the mix. These qualities include robustness,<sup>178</sup> scales of both space and time,<sup>179</sup> and synergies and tradeoffs.<sup>180</sup>

A final dimension – agriculture subsidy policy – is a crucial component of the economic pillar of sustainable agriculture. Current subsidy policies have been criticized for, among other things, subsidizing commodity crop farmers to the detriment of farmers of specialty crops, who are more likely to employ sustainable farming practices.<sup>181</sup> Lawmakers, scholars, and

<sup>175</sup> TOWARD SUSTAINABLE AGRICULTURAL SYSTEMS, *supra* note 156, at 24-25.

<sup>176</sup> Despite the NRC's focus on the farmworker dimension, scholars have lamented the near exclusion of farm labor issues from the agriculture sustainability discussion, claiming that it is a "lost opportunity." See Guadalupe T. Luna, *The Dominion of Agriculture Sustainability: Invisible Farm Laborers*, 2014 WIS. L. REV. 265, 269 (2014).

<sup>177</sup> TOWARD SUSTAINABLE AGRICULTURAL SYSTEMS, *supra* note 156, at 25 (Box 1-6).

<sup>178</sup> See *supra* notes 45-49 and accompanying text.

<sup>179</sup> TOWARD SUSTAINABLE AGRICULTURAL SYSTEMS, *supra* note 156, at 27.

<sup>180</sup> This quality refers to the fact that components of sustainable agriculture "synergies and tradeoffs" that components of sustainable agricultural systems will be "mutually reinforcing," and will reflect decisions that make difficult tradeoffs between competing environmental, economic, and social goals. *Id.* at 28-29.

<sup>181</sup> See William S. Eubanks, II, *The Future of Federal Farm Policy: Steps for Achieving a More Sustainable Food System*, 37 VT. L. REV. 957, 960-61 (2013)

NGOs advocate for significant changes to subsidy policies that would allocate subsidy dollars to farmers who use sustainable practices regardless of the crops they grow,<sup>182</sup> and that would otherwise steer federal dollars to sustainable agricultural operations.<sup>183</sup>

### III. DIALECTS AND DIMENSIONS: TOOLS FOR SKILLS AWARENESS

The point made thus far is that a workable understanding of sustainability in context can be achieved by identifying and deciphering an entity's sustainability dialect, and by determining how sustainability's core dimensions relate to that entity. Extrapolating that idea to sustainability more generally suggests that a dialects and dimensions approach can help organize and manage a larger study of sustainability. But there is, arguably, even more to be gained from a dialects and dimensions approach. On a more theoretical level, engaging with sustainability by working with its dialects and dimensions can build awareness of law and language skills and dimensional analysis tools that are particularly relevant to lawyering for sustainability.

There is nothing unique in suggesting that legal professionals consider linkages between law and language;<sup>184</sup> in that regard, this article does not explore uncharted territory. Instead, it seeks to demonstrate the relevance of that suggestion when considering how lawyers should think about sustainability, and to further suggest that thinking in terms of its

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(explaining that farmers who grow specialty crops, and who are more likely to employ sustainable farming practices, receive little or no federal subsidies). In criticizing the state of the nation's farm subsidy policy, Eubanks writes, "Indeed, with each passing farm bill, one can argue that the domestic farming and food system is gradually moving towards its own failure to accomplish the fundamental objective of feeding the nation, at least in terms of providing nutritious food grown in an ecologically resilient manner that seeks to preserve our natural resources for the long term." *Id.* at 959. Nevertheless, one area that has enjoyed an increase in subsidies is local foods, where funding is improving the productivity of local farms, and increasing demand for locally grown products. Galey & Endres, *supra* note 157, 17-25.

<sup>182</sup> Eubanks, *supra* note 181, at 968. Eubanks believes this change would lead some agribusiness corporations to shift part of their operations to specialty crops, which bring farmers more of an economic return than commodity crops. *Id.* at 969.

<sup>183</sup> *Id.* at 972-75. (noting that the "2008 farm bill limited direct payments" and President Obama endorsed elimination in 2011).

<sup>184</sup> See, e.g., Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263 (1995); James Boyd White, *An Old-Fashioned View of the Nature of Law*, 12 THEORETICAL INQUIRIES L. 381 (2011).

language can sharpen professional skills. The extensive literature on law and language leaves no doubt that language-related tools have a practical value for scholars and practitioners alike. Two law and language concepts – translation and mediation – are particularly useful when considering sustainability.

There is also nothing earth-shattering about suggesting that lawyers think about the various dimensions of legal doctrines or, more generally, lawyering skills.<sup>185</sup> Legal scholars have encouraged their readers to think dimensionally, directly and indirectly, on a fairly consistent basis. In the last few decades, dimensional perspectives have been suggested in areas including law and aesthetics,<sup>186</sup> social justice,<sup>187</sup> environmental law,<sup>188</sup> International criminal law,<sup>189</sup> legal ethics,<sup>190</sup> legal reasoning,<sup>191</sup> legal skills,<sup>192</sup> and more generally, legal education.<sup>193</sup> This literature illuminates benefits of

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<sup>185</sup> See, e.g., Timothy P. Terrell, *Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles*, 72 CAL. L. REV. 288 (1984); Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: A Theoretical Framework*, 26 OKLA. CITY U. L. REV. 547 (2001).

<sup>186</sup> See, e.g., Louis B. Schwartz, *Justice, Expediency, and Beauty*, 136 U. PA. L. REV. 141 (1987); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002).

<sup>187</sup> See, e.g., John O. Calmore, *Social Justice Advocacy in the Third Dimension*, 16 FLA. J. INT'L L. 615 (2004); Peter Gabel, *The Spiritual Dimension of Social Justice*, 63 J. LEGAL EDUC. 673 (2014).

<sup>188</sup> See, e.g., Lisa Heinzerling, *Environmental Law and the Present Future*, 87 GEO. L.J. 2025 (1999); John S. Applegate, *The Temporal Dimension of Land Pollution: Another Perspective on Applying the Breaking the Logjam Principles to Waste Management*, 17 N.Y.U. ENVTL. L.J. 757 (2008).

<sup>189</sup> See, e.g., Jenia Iontcheva Turner, *The Expressive Dimension of EU Criminal Law*, 60 AM. J. COMP. L. 555 (2012).

<sup>190</sup> See, e.g., Geoffrey C. Hazard, Jr., *Dimensions of Ethical Responsibility: Relevant Others*, 54 U. PITT. L. REV. 965 (1993); Donald P. Robin et al., *The Effect of Attorneys' Perceived Duty to Client on Their Ethical Decision Making Process*, 34 AM. BUS. L.J. 277 (1996).

<sup>191</sup> See, e.g., Terrell, *supra* note 185, at 288.

<sup>192</sup> See, e.g., Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57 (2009); Ben W. Heineman, Jr., *Law and Leadership*, 56 J. LEGAL EDUC. 596 (2006).

<sup>193</sup> The work of Mark Jones is one example of this approach. See Jones, *supra* note 185; see also Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: A Historical Framework – A History of U.S. Legal Education Phase I: From the Founding of the Republic until the 1860s*, 39 J. MARSHALL L. REV. 1041 (2006) [hereinafter, "*A Historical Framework*"]. Another example can be found in work from the United Kingdom that describes that country's lack of research analyzing the

dimensional thinking that are relevant to lawyering for sustainability, including acquisition and organization of knowledge, a heightened awareness of social justice, and the development of professional leadership qualities.

*A. Law, Language, and Sustainability: Translation and Mediation*

Writing over thirty years ago, Christopher Stone prevailed upon legal scholars to use their facility with law's language to enliven and enrich their research by working with language theory.<sup>194</sup> Convinced that legal scholarship was, at the time, "fragmented and drifting," he proposed a new path for scholars, one directed at determining which attributes of social understanding should be brought into the law's language.<sup>195</sup> He explained that, although legal language shares characteristics with other languages, it is unique because it identifies what aspects of our world matter.<sup>196</sup> Those who practice law are masters of its language; to them, law is fundamentally a "language activity" that can be evaluated from the perspective of any of a number of language-related fields.<sup>197</sup>

Perceiving law as its own language stratum<sup>198</sup> can focus and energize the work of legal scholars.<sup>199</sup> Stone believed that the academic's most valuable work is not to reveal scholarly insights about law, but rather to work as agents *in* the law.<sup>200</sup> Drawing on mathematics, he proposed a scholarship

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emotional dimensions of legal education. See Caroline Maughan, *Why Study Emotion?*, in *AFFECT AND LEGAL EDUCATION: EMOTION AND LEARNING AND TEACHING THE LAW*, pp. 21-22 (Paul Maharg & Caroline Maughan, eds. 2011) (noting that U.S. researchers have more fully explored the emotional aspects of legal education).

<sup>194</sup> See Christopher D. Stone, *From a Language Perspective*, 90 YALE L.J. 1149 (1981).

<sup>195</sup> *Id.* at 1149, 1180.

<sup>196</sup> *Id.* at 1158.

<sup>197</sup> Stone mentions the fields of "semantics, language philosophy, linguistics, psycholinguistics, communications theory, structuralism, and ... literary criticism, [and] rhetoric ... ." *Id.* at 1160-61. He further observes, "[T]he language-related disciplines contribute to an understanding of the law in its every manifestation; the amount of effort we should be putting into language analysis has to be measured in that light." *Id.* at 1167.

<sup>198</sup> Stone borrows the phrase "language stratum" from the work of Freidrich Waismann, a language philosopher. *Id.* at 1161-63 (citing Freidrich Waismann, *Language Strata*, in *LOGIC AND LANGUAGE* 225 (A. Flew ed. 1965)).

<sup>199</sup> *Id.* at 1168.

<sup>200</sup> *Id.* at 1173 (emphasis in original).

model in which researchers identify developing social impulses with little or no direct connection to the law and monitor their evolution to determine whether and when the language of the law should be modified to take them into account.<sup>201</sup> If that time has arrived, the scholar's job is to translate the developments into language that fits into the core of the law, in effect editing the law's language to adjust to social change.<sup>202</sup> Stone believed this language-related task best suited the skills of legal scholars and served the legal community.<sup>203</sup>

The model of a law-language stratum, influenced and at times modified by forces at work in outer layers of social interaction, is one that can benefit legal scholars and practitioners alike. The model portrays the evolution of law and law's language as a dynamic, integrative process that can be facilitated by scholars who are willing to look beyond the academy. More importantly, it emphasizes the role of lawyers as translators and editors who work toward understanding the language of others and determining how that language bears on law's core.

The law-as-language and legal scholar-as-translator ideas that Stone embraced grew out of a movement that began in the 1970s,<sup>204</sup> when sociolinguistics and Law and Society scholars began analyzing the relationship between language and social context, and the linkages between

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<sup>201</sup> *Id.* at 1173-76. Stone explains, "Many ideas that come to influence law come not from its center, but from beyond its outer reaches: they originate in folksongs, on the stage, in periodicals." *Id.* at 1176.

<sup>202</sup> *Id.* at 1179-80 (noting that these skills – translating and editing to adjust the law – are special and complicated).

<sup>203</sup> *Id.* at 1180. Stone states, "I am contending that where the law scholar's skills and traditions are most specially, and where scholarly collaboration is most required, is in establishing what attributes of the world – in particular what aspects of human character and conflict – should be fitted into law, and in what manner, and in accordance with what logical style they should be *handled*." (emphasis in original). As examples of areas of law where changes were likely imminent, he noted "life-style" issues that were, at the time of his writing, "wending their way toward and into legal recognition." At the time he wrote this essay, he felt it was likely that the law's core would undergo changes in areas including nuisance, zoning, and welfare law, among others. *Id.* at 1180-1181.

<sup>204</sup> JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS, LAW LANGUAGE, AND POWER xiii (2d ed. 2005) [hereinafter JUST WORDS].

law and social context, respectively.<sup>205</sup> Law and linguistics adherents describe lawyers working in various practice settings as bilingual, able to translate the language of their clients into the language of law.<sup>206</sup> Lawyers also act as translators when interpreting legal texts,<sup>207</sup> an idea that fed the linguistics-centered new textualism movement of the 1990s.<sup>208</sup> Critics of that movement urged a more comprehensive use of linguistics to take into account “the dynamics of ‘ordinary language,’” with a particular focus on language acquisition.<sup>209</sup> More recently, the language used in daily conversations in law practice has been shown to generate and transmit power in ways that reinforce domination.<sup>210</sup>

Language acquisition involves a bottom-up process in which language learners develop a feeling for a language based on a “network of similarities ... that distinguishes one language from another.”<sup>211</sup> Populations of individuals who share a feeling for a language comprise what linguists refer to as a “speech community,” a group that shares both a common language and “the day-to-day interactions that make up their common parole.”<sup>212</sup> The

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<sup>205</sup> *Id.* at 10-11. In ensuing years, sociolinguists proved that variations in language are tied to social differences, and law and society scholars proved that law, at times, fails to fulfill its promises of equality and fair treatment. *Id.* at 12-13.

<sup>206</sup> See Chen, *supra* note 184, at 1269 (citing the work of James Boyd White and Clark Cunningham). According to this model, “[t]he good lawyer speaks both the language of the law and the language of the people.” *Id.*

<sup>207</sup> *Id.* (citing the work of Lawrence Lessing).

<sup>208</sup> *Id.* at 1265 (explaining textualism’s focus on “matters of semantics, syntax, and pragmatics --the essentials of meaning, sentence structure, and noncontextual aspects of language.”).

<sup>209</sup> *Id.* at 1289-1290. Chen promoted a broader interpretive process, guided by the “engine that drives the enormously creative legal mind,” that would take into account “implicit political values, and accepted rhetorical devices” used by those who “shape the law.” *Id.* at 1306.

<sup>210</sup> JUST WORDS, *supra* note 204, at 7-8. The authors elaborate: “Legal power occasionally manifests itself as the power of the state ... . But the manifestations of legal power that have the most direct impact on individuals are usually local ... .” *Id.* at 9.

<sup>211</sup> Chen, *supra* note 184, at 1285. The feeling for a language is known as “Sprachgefühl,” a term attributed to Louis Hjelmslev, LANGUAGE: AN INTRODUCTION 44 (Francis J. Whitfield trans., 1970). See *id.* at footnotes 56, 142.

<sup>212</sup> *Id.* Chen describes the acquisition of law’s language in the first year of law school as the equivalent of a “Berlitz course,” which he suggests is a good example of the translation metaphor. He further explains, “An encounter between a native speaker and a foreigner forces the native speaker ‘to recognize [hidden linguistic] complexities’ so

acquisition of law's language follows a similar process,<sup>213</sup> one that ultimately creates a speech community of lawyers.<sup>214</sup>

Within the speech community of the law there are multiple dialects that generate friction as they interact. Because law is "a kind of translation"<sup>215</sup> that is constantly in play when lawyers represent clients,<sup>216</sup> the translation function is far from one-dimensional. It operates in the midst of "inherently unstable, dynamic, and dialogic tensions" that arise in legal settings when the dialects of separate speech communities confront one another.<sup>217</sup> Obvious tensions exist between the lawyer's language and the ordinary language of clients, witnesses, and jurors.<sup>218</sup> Other tensions arise within the legal community itself, where practitioners, judges, and written sources of law employ "different voices, many different languages."<sup>219</sup> Additional tensions that affect a lawyer's translation function include those between substance and procedure; law and justice; and the past, present and future.<sup>220</sup> Competing interpretations of legal sources present tensions for judges, who must use translation skills to resolve those interpretations.<sup>221</sup> These multiple frictions complicate the translation function of every lawyer and judge who works within law's speech community.<sup>222</sup>

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that she can explain her speech community's linguistic conventions to the outsider. There may not be a more generous description of law teaching." *Id.* at 1286 (footnote omitted).

<sup>213</sup> *Id.* at 1287.

<sup>214</sup> *Id.* at 1287-88. Chen argues that, given the bottom-up nature of language acquisition, the top-down reasoning of the new textualism is at odds with linguistics theory.

<sup>215</sup> White, *supra* note 184, at 386 (noting that a lawyer's translation function is an activity of thought and language).

<sup>216</sup> *Id.* at 384, 385 (explaining the need to master the language of the law to competently counsel and advocate for clients).

<sup>217</sup> *Id.* at 386. Far from making the practice of law more difficult, White sees law as a "poem." *Id.*

<sup>218</sup> *Id.* at 388-89. White explains that the lawyer "has to translate, as well as possible, both ways, into the law and out of it . . ." *Id.* at 389. This tension is made more acute by emotions or physical feelings that are experienced by individuals that cannot be adequately expressed in words. *Id.*

<sup>219</sup> *Id.* at 390 (listing, as examples, the disparate voices of judges, expert witnesses, constitutions, and statutes).

<sup>220</sup> *Id.* at 394-97.

<sup>221</sup> *Id.* at 393-94.

<sup>222</sup> *Id.* at 391 (noting that, "Perhaps we do not teach translation of this kind in law school but we certainly should"). White explains that maneuvering between the tensions inherent in the law's various dialects creates an opportunity for lawyers to be

Acceptance of the law-translation metaphor raises questions about how that function should be practiced. Ideally, a lawyer's translation activities will optimize benefits for clients and the legal system as a whole. One methodology aimed at achieving those ends, based on ethnography,<sup>223</sup> explains that any act of translation changes the meaning of the original language. Change occurs as the translator adds and subtracts from the experience embodied in the original text, which is inevitable given the impossibility of matching every word and phrase in one language with those of another.<sup>224</sup> Competent translators are aware of, and respect, the uniqueness of the original language, and are additionally able to release themselves from their own ways of thought to be more fully accepting of the differences of others.<sup>225</sup>

There is a "translator's ethic"<sup>226</sup> inherent in this skill, because a lawyer must carefully and continuously attend to the language of the original speaker while engaged in translation.<sup>227</sup> The goal is to locate key words of the client's narrative "that might reveal the particularities of the client's' world

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creative. It "creates a space for newness and creativity in reading the texts of the law, which might otherwise be read in dead and mechanical ways." *Id.* at 392.

<sup>223</sup> See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards An Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1301 (1992)(relying on both anthropology and language theory).

<sup>224</sup> *Id.* at 1335-36 (using White's terminology of "deficiency and exuberance" to refer to the transformation in meaning made by translators).

<sup>225</sup> *Id.* Here Cunningham quotes White: "[Translation] recognizes the other – the composer of the original text – as a center of meaning apart from oneself. It requires one to discover both the value of the other's language and the limits of one's own." *Id.* at 1336 (quoting JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 257 (University of Chicago Press, 1990)). Cunningham further explains that, in order to develop this habit, lawyers must be consistently aware of instances when there is a danger of deviating from original language, and continuously cycle back to original words to assure a true interpretation. *Id.* at 1338-39.

<sup>226</sup> *Id.* at 1338 (noting White's use of the word "integration" to refer to the ethical process of translation).

<sup>227</sup> Cunningham combines this idea with an approach to ethnography that results in a methodology of translation that treats the language of a client as "exotic," to be carefully recorded as a "text," and repeatedly studied by the lawyer to search for both similarities and differences with legal discourse. *Id.* at 1346, 1348-49 (referring to ethnographers' skills).



view.”<sup>228</sup> Translating in this way helps the lawyer arrive at a truer translation of the client’s “discourse,” a term that refers to the “larger units of speech” that may include “entire ways of talking that characterize a profession or discipline.”<sup>229</sup> It additionally helps lawyers avoid incomprehension and domination that might otherwise occur.<sup>230</sup>

The domination inherent in translation is very real. Legal discourse includes law’s language, its structures, and the issues that drive them;<sup>231</sup> but it is also “a locus of power” that creates its own reality.<sup>232</sup> Power is exercised when the language used in legal settings is altered by legal discourse, a process referred to as “textual travel.”<sup>233</sup> One mode of travel occurs when translators recontextualize language to align it with their cultural practices.<sup>234</sup> These translators act as mediators, exercising power by way of translation; they include governments and private entities that control the translation/recontextualization process in ways that reflect their diverse “cultural practices and ideological agendas.”<sup>235</sup>

The insights from law and language scholars are of considerable value to practitioners of sustainability. The adoption and implementation of sustainability initiatives by public and private actors has mutated its core

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<sup>228</sup> *Id.* at 1349.

<sup>229</sup> *Id.* at 1345.

<sup>230</sup> *Id.* at 1348.

<sup>231</sup> JUST WORDS, *supra* note 204, at 6-8.

<sup>232</sup> *Id.* at 7, 9 (drawing heavily on the work of Michel Foucault). The authors further point out that the “reality” can eventually be undermined when those who are fluent in the discourse use their expertise leads them to subvert it. *Id.* at 7 (noting that “dominant discourse plants the seeds of its own undoing”). An example of this type of subversion, in the sustainability context, is Benson and Craig’s disavowal of sustainability in favor of resilience. See Benson & Craig, *supra* note 2.

<sup>233</sup> See Frances Rock, et al., *Textual Travel in Legal-Lay Communication*, in LEGAL-LAY COMMUNICATION: TEXTUAL TRAVELS IN THE LAW 3 (Chris Heffer, Frances Rock & John Conley eds. 2013). The authors more fully explain, “[T]extual travel concerns the way that texts move through and around institutional processes and are shaped, altered, and appropriated during their journeys.” *Id.* at 4.

<sup>234</sup> *Id.* at 10.

<sup>235</sup> *Id.* at 25 – 26 (using the example of a government transforming the language of university research). The text uses the example of the government as a mediator, but private actors often engage in mediation as well.

language. This process has formed many distinct dialects, each one constructed to further the vision and mission of a discrete enterprise. The sustainability dialects of those enterprises often touch on many different areas of law, requiring lawyers who work with those entities to use the translation and mediation skills described above.

To become fluent in sustainability's dialects is to become multi-lingual, not simply bi-lingual. Lawyers who work with sustainability's dialects draw on the language of daily interactions of their clients, whether they represent business, government, or the agricultural community. By developing a "feel" for a client's sustainability dialect these lawyers are able to translate a client's words and phrases into sustainability's norms as well as other relevant legal doctrines. The translation and textual travel that occurs as this process unfolds is complex, because it requires recontextualization of language at multiple levels.

Juggling sustainability's core language, underlying legal doctrines, and client-specific dialects will invariably expose the tensions noted above. Lawyers will certainly confront the substantive tensions of sustainability, which pit economic, environmental, and social justice objectives against one another over the course of time. Tensions between sustainability's goals and underlying legal doctrines may also arise. Lawyers called upon to resolve those tensions will manage textual travel by exercising the mediation skills described above. In doing so, they must be aware of the dangers of domination as well as the ethical obligation to assure that competing voices have been fairly translated. As is true of the translation function, a lawyer's mediation function is complicated by sustainability, because sustainability's scope, and the manner in which it intersects with various legal doctrines, creates multiple levels of conflict that must be reconciled.

Encouraging lawyers to think about sustainability by focusing on its dialects does more than make the field more accessible. It also points toward a range of translation and mediation skills that can be used to further a client's sustainability goals.

*B. Legal Dimensions: Substance, Social Justice, and Professional Identity*

Despite its usefulness, scholarship extolling the value of dimensional analysis largely fails to define what “dimension” means in any given context. Dictionary definitions such as “any measureable extent, as length, width, depth . . .,”<sup>236</sup> refer to three common dimensions but allow a more expansive meaning.<sup>237</sup> Much of the dimensions scholarship in legal literature uses the term somewhat loosely to refer to aspects of law or philosophy that can be teased out of, or considered in conjunction with, an existing legal topic. In this sense, a dimension is a separate bulk, insight, or effect that relates to the topic in meaningful ways. Although these sorts of dimensions cannot be measured by traditional means, they are dimensions nevertheless because they either add something to an existing area of law or form a part of it.

A common form of dimensional analysis categorizes the substantive dimensions of a more generalized legal topic.<sup>238</sup> Law school curricula received this treatment in a historical review that categorizes the study of law into six dimensions.<sup>239</sup> It was also employed in a breakdown of the structural dimensions of a lawyer’s ethical responsibility,<sup>240</sup> and in empirical work analyzing an attorney’s ethical judgments using three dimensions.<sup>241</sup> A different substantive approach singles out particular aspects, or dimensions, of an area of law for further exploration. Examples include scholarship that

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<sup>236</sup> WEBSTER’S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 386 (3d College ed. 1988)(emphasis added).

<sup>237</sup> Time is considered the “fourth dimension.” *See id.* at 533.

<sup>238</sup> A large and useful body of scholarship addresses the theoretical dimensions of law generally. Examples include Schwartz and Schlag, *supra* note 186. Although the theoretical insights of these and similar works may be relevant to sustainability, they will not be addressed in this piece, which focuses instead on legal substance and skills.

<sup>239</sup> Jones, *A Historical Framework*, *supra* note 193, at 1046, 1176-77 (dividing the law school curricula into six dimensions: substantive, structural, practical, social, cultural, and transnational). Jones’ two articles in this area discuss these dimensions in terms of both history and theory. *See generally*, *supra* notes 185 and 193.

<sup>240</sup> *See* Hazard, *supra* note 190, at 968 (presenting the dimensions of ethical responsibility, one of which involves “relevant others”).

<sup>241</sup> *See* Robin et al., *supra* note 190, at 279-81 (utilizing dimensions related to moral equity, relativism and contractualism).

focuses on the temporal dimensions of environmental laws,<sup>242</sup> and research that singles out the social pillar of sustainability for treatment.<sup>243</sup> While these works explore known components of law by casting them as “dimensions,” other dimensional analyses uncover emerging aspects of existing laws. An example is recent work that raises concerns about the expressive dimension of criminal law in the European Union.<sup>244</sup>

The dimensions of legal skills have also captured the attention of scholars. Thirty years ago, Timothy Terrell urged readers to think beyond two-dimensional legal reasoning that pulls lines of cases and statutes together to form an understanding of the law.<sup>245</sup> His third dimension of legal reasoning would “give a larger life” to traditional analysis “by reasoning about [legal concepts] from extralegal perspectives,” including economics and philosophy.<sup>246</sup> Terrell believed that reasoning in this dimension would spur wide-ranging debates that are otherwise absent from traditional legal analysis, and lead to an understanding of “law as a complex social phenomenon involving far more than the narrow institutional concerns explicitly recognized by courts and legislatures.”<sup>247</sup>

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<sup>242</sup> See Heinzerling and Applegate, *supra*, note 188. The works of Heinzerling and Applegate differ in that one addresses the importance of fully quantifying future lives saved in assessing the benefit of proposed environmental regulations, *see* Heinzerling, *supra* note 188, at 2027-28, while the other seeks to differentiate the temporal dimensions of land-based hazardous waste management from those involved in the management of air and water pollutants, *see* Applegate, *supra* note 188, at 758. Both, however, focus on past, present, and future dimensions of environmental regulation.

<sup>243</sup> See Kevin Murphy, *The Social Pillar of Sustainable Development: A Literature Review and Framework for Policy Analysis*, SUSTAINABILITY: SCIENCE, PRACTICE, & POLICY 8(1):15-29, at 15 (published online March 13, 2013) <http://sspp.proquest.com/archives/vol8iss1/1008-041.murphy.html> (analyzing public awareness, equity, participation, and social cohesion as dimensions of the social equity component of sustainability).

<sup>244</sup> See Turner, *supra* note 189, at 557-58 (describing recent legislation in the EU that expresses the “mutual core values,” and advising caution).

<sup>245</sup> Terrell, *supra* note 185, at 298-300.

<sup>246</sup> *Id.* at 306.

<sup>247</sup> *Id.* at 306, 308. Terrell’s fourth dimension would “transcend reason itself.” *Id.* at 314-16 (comparing this dimension to a theory of art comprised of three “variables”: skill, taste, and creativity”).

Writers have also described social justice lawyering as three-dimensional, comprised of activist lawyering, public consciousness litigation, and collaborative community engagement.<sup>248</sup> Lawyers engaged in these activities enlarge their “vision and sense of the possible,”<sup>249</sup> and play an important role in building the political consciousness of communities. Working with law students to develop these dimensions of social justice skills is not only important, it can pay dividends.<sup>250</sup> Other scholars have focused on the spiritual dimensions of social justice issues.<sup>251</sup> The recent work of Peter Gabel confronts what he believes to be a culture of disconnected individuals, reinforced by a legal system that has been de-spiritualized by empiricism and secularism.<sup>252</sup> The institution he helped establish, the Project for Integrating Spirituality, Law, and Politics, seeks to change that dynamic by drawing attention to the strong social bond of humankind that longs for “mutual recognition,”<sup>253</sup> and by taking steps to “foster empathy and compassion and human understanding ....”<sup>254</sup> His ultimate goal is to transform legal education in ways that make new lawyers more mindful of human relationships.<sup>255</sup>

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<sup>248</sup> Calmore, *supra* note 187, at 623-24.

<sup>249</sup> *Id.* at 636 (noting that, “[w]hen the vision and enlarged sense of the possibilities of direct commitment and social justice benefit [law students] in the real world, it is gratifying. It keeps hope alive.”).

<sup>250</sup> *Id.* at 635.

<sup>251</sup> Gabel, *supra* note 187, at 673, 680-81. Gabel’s project is based in Washington, D.C. *Id.* at 680, n.4.

<sup>252</sup> *Id.* at 674-76.

<sup>253</sup> *Id.* at 673-74 (noting that “we are always animated by the desire for an authentic mutual connection with another human being, or with many other human beings) and 680-81.

<sup>254</sup> *Id.* at 681 (also noting the Project’s work in restorative justice).

<sup>255</sup> *Id.* at 682-83 (aspiring “to transform the way law is taught so that the next generation of lawyers develops what might be called a ‘post-liberal’ conception of human relationships.”). There is an alignment between Gabel’s lawyering model and the ethics that govern lawyers as translators. The social justice skills Gabel calls for will, at a minimum, require lawyers to practice with an “ethic of fundamental equality” as they translate their client’s stories in ways that are sensitive to their histories and experiences. See James Boyd White, *Translation as a Mode of Thought* 77 CORNELL L. REV. 1388, 1393 (1992). The translator’s ethic will also require lawyers to be diligent in selecting the law language that best suits a client’s needs. See Cunningham, *supra* note 223, at 1338. “The translator’s ethic compels a continuing cycle in which the

Distinct from substantive and skills dimensions scholarship is work that emphasizes the leadership and professional identity dimensions of lawyering. Researchers in this area argue that an overemphasis on the cognitive dimension of legal education has short-changed not only its skills dimension, but also its “civic dimension,” which refers to the part of legal education that addresses “professional identity and responsibility.”<sup>256</sup> Although clinic experiences have been shown to ease the transition into practice,<sup>257</sup> research has found far less of a “clinic effect” on the civic dimension of legal education.<sup>258</sup> Others who have written more generally about the professional identity gap call for more leadership training in law schools<sup>259</sup> to cultivate a multi-dimensional understanding of society.<sup>260</sup> The dimensions of leadership, or “qualities of mind,”<sup>261</sup> of lawyer-leaders include an ability to think creatively and constructively, not just critically; to “articulate . . . systematic and constructive options that expose and explore the value of tensions inherent in most decisions,” to search for balance “between legitimate competing values, . . . [and to] think about the ethical, reputational,

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translator must continually confront the flaws of the expression he is creating in the second language, return to the ‘other’ in the first language, and then begin the endeavor anew.” *Id.* (citing Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Legal Education*, 75 MINN. L. REV. 1599 (1991)).

<sup>256</sup> Sandefur & Selbin, *supra* note 192, at 61. Social justice scholars point to similar deficiencies in legal education. See STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 60 (2004). The authors cite various studies that demonstrate “a three-year retreat from cause lawyering” while students are enrolled in law school. *Id.* at 54-58 (emphasis omitted).

<sup>257</sup> Sandefur & Selbin, *supra* note 192, at 100.

<sup>258</sup> *Id.* at 100-102. The authors note that professional behavior is more likely to be influenced by market conditions and the location of a lawyer’s practice. *Id.* at 104.

<sup>259</sup> Ben W. Heineman, Jr., *supra* note 192, at 596. Heineman is a Senior Fellow of Harvard University’s Corporate Governance Program and formerly served as GE’s Senior Vice President and General Counsel. A brief biography is available at [www.law.harvard.edu/programs/corp\\_gov/bio\\_Heineman.shtml](http://www.law.harvard.edu/programs/corp_gov/bio_Heineman.shtml).

<sup>260</sup> Heineman, *supra* note 192, at 601-602 (explaining that “multi-dimensional views of society, not just preoccupation with narrow rules or minor legal change, informed . . . generations” of law’s leaders).

<sup>261</sup> *Id.* at 599.

and enlightened self-interest of their client or the institution they are leading, not just about what is strictly legal or advantageous in the short term.”<sup>262</sup>

These perspectives suggest at least four ways that lawyering can benefit from an understanding of sustainability’s dimensions. As a preliminary matter, being knowledgeable about sustainability’s dimensions helps assure professional competency.<sup>263</sup> For lawyers who practice in the area of sustainability, competency begins with an awareness of sustainability’s many dimensions, but it also requires an understanding of how these dimensions are applied. The three substantive dimensions – economy, environment, and social equity - do not function as elements that establish a cause of action; neither are they factors that must be considered in a commonplace balancing test. Instead, the three pillars are used in conjunction with one another as tools to guide decision-making. The process is a dynamic one that searches for synergies and tradeoffs<sup>264</sup> in order to craft an outcome that optimizes social, environmental, and economic benefits.<sup>265</sup> Knowing which dimensions are relevant to sustainability and how those dimensions should be applied in context is fundamental to developing professional competence in the practice of sustainability.

Second, the inter-disciplinary and temporal demands of sustainability require lawyers to think beyond institutional boundaries in order to account for social and other extra-legal phenomena. The integration of extra-legal considerations into the lawyering process moves legal analysis into Terrell’s third dimension of legal reasoning, transcending traditional legal thought. Third, as lawyers confront the social equity angle, their awareness of social justice concerns will grow, as will their ability to recognize those concerns and deal with them respectfully within the context of sustainable decision-making. As this occurs, they will develop social justice skills and, perhaps, better appreciation for the human connection.

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<sup>262</sup> *Id.* at 599-600.

<sup>263</sup> *See, e.g.,* RUSSELL G. PEARCE ET AL., PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH 86 (2011) (stating that, “[a] bedrock duty of the lawyer is to provide competent representation”).

<sup>264</sup> *See, e.g.,* GREEN BOOK, *supra* note 71, at 66.

<sup>265</sup> *Id.*

Finally, working with sustainability issues creates opportunities to build and showcase leadership qualities and develop professional identity. Lawyers who gain an understanding of sustainability's substantive dimensions are more mindful of tensions between economic, environmental, and social equity considerations, and between present and future generations. In resolving tensions between conflicting values, lawyers search for creative and constructive solutions, a process that requires fair and balanced decision-making while keeping present and future consequences in mind. This process strengthens problem-solving skills and shapes professional identities in ways that build leadership qualities.<sup>266</sup>

## VI. CONCLUSION

As part of its ongoing commitment to sustainability, the ABA is encouraging lawyers to develop the special skills they need to assist clients and their firms in moving toward sustainability. The ABA's rationale for this initiative is convincingly grounded in the profession's role in society, law firm longevity, client expectations, and leadership. This article has sought to supplement the ABA's effort by suggesting that thinking about sustainability as a discourse comprised of many rich dialects and as a complex, multi-disciplinary process can yield benefits for lawyers. Practitioner approaches to sustainability that are guided by these insights will make the substance of sustainability more accessible and tap skill sets that enhance professionalism and more fully serve the ABA's sustainability objectives.

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<sup>266</sup>See *supra* notes 56-57 and accompanying text.



